Dispute Resolution in Family Law:

Protecting Choice, Promoting Inclusion

December 2004

EXECUTIVE SUMMARY

Report prepared by Marion Boyd

Executive Summary

On June 25, 2004, the Attorney General, the Honourable Michael Bryant, and the Minister Responsible for Women's Issues, the Honourable Sandra Pupatello asked Marion Boyd to conduct a review of the use of arbitration in family and inheritances cases and to examine the impact that the use of arbitration has on vulnerable people, including women, persons with disabilities and elderly persons.

The Review began as a result of public concern expressed in the media and through groups and individuals about the use of Muslim personal law (often referred to as Sharia) in arbitrations. There was significant confusion in the media and public consciousness about a plan by the Islamic Institute of Civil Justice to establish a "Sharia Court" in Ontario. These public concern led to a need to address the issue of the use of arbitration in family and inheritance cases in a comprehensive and constructive way. Ms. Boyd, a former Attorney General, and former Minister Responsible for Women's Issues, was asked to gather and articulate the concerns of Ontarians, and provide recommendations to the government. This report is the result of the Review process, and contains Ms. Boyd's conclusions and recommendations.

There was a high level of consensus about the remedies that respondents proposed to safeguard Ontario's arbitration process and permit the continued use of alternatives to court for family law and inheritance cases. In this context, the report concludes that tolerance and accommodation of minority groups who seek to engage in alternative dispute resolution must be balanced against a firm commitment to individual autonomy. It is important to seek solutions that respect not only the rights of minority groups within Ontario, but also help individuals within that minority exercise their individual rights with ease.

Arbitration

Arbitration is a dispute resolution method in which people participate only by choice. The court system is the only mandatory dispute resolution process in which people can be compelled to participate without their agreement. The Review heard that arbitrated decisions may be more acceptable to the parties, and more reflective of some elements of the parties' shared values. Religious arbitration can allow the people in dispute to select a shared set of values and rules that may be different than Ontario law. Use of the *Arbitration Act* by minority communities is a way of engaging with the broader community by formalizing a method of decision-making which currently occurs in an informal manner.

Family Law

Family law is an area of shared jurisdiction between the federal and provincial governments. Most family law disputes are resolved without court action, but increasingly alternative dispute resolution is used. Arbitration can only resolve disputes that the parties could agree about themselves; it cannot change a person's status by granting a divorce, or by concluding that they are a parent. Domestic contracts, such as separation agreements, are a common means of resolving family law disputes and the law has some built-in safeguards for these types of contracts. The Review heard concerns about polygamy and child abduction, but these issues are not affected by arbitration. Criminal law and child welfare law protect children from abuse, and people have a duty to report children in need of protection.

The Importance of the *Charter*

Ontarians believe deeply in the *Canadian Charter of Rights and Freedoms'* aims of justice, fairness and equality. They do not see multiculturalism to be an unlimited concept, but rather one that must be balanced against individual freedoms. All participants in the Review articulated a desire to protect and enhance access to justice, but took very different perspectives on what this would look like. All participants in the Review had a high level of interest in the *Charter*, but the application of many of the provisions of the *Charter* in the context of arbitration is not clear. Nonetheless, the Review did not conclude that the *Charter* prohibits the use of arbitration for resolving disputes about family law and inheritance.

Violence Against Women

Exposing and ending violence against women is a pressing public policy concern in most parts of the world. This concern is expressed and supported by the *United Nations Declaration on the Elimination of Violence Against Women*. Addressing domestic violence is impossible when attitudes and beliefs that condone violence persist. Alternative dispute resolution may provide a venue for continued abuse after the breakdown of a relationship, and therefore safeguards must be in place. Many respondents to the Review recognized the need for the Muslim community to counter traditional attitudes that may condone violence against women.

Personal Law

Personal law is the law that pertains to an individual's status and membership in a community or family group. Family and inheritance matters fall within a category of personal law that developed primarily from religious sources. Personal law has been used throughout history to allow groups to maintain their cultural identity, by allowing them to continue to control their definitions of family and community. In parts of Europe, the practice of applying the personal law of an individual's country of origin continues until today. For example, the citizenship laws of France and Germany mean that people may not be subject to the laws of their country of residence, but rather their country of origin.

Themes in the Submissions

There were a number of different themes expressed by those consulted, which were often contradictory. Some thought that arbitration should not be permitted in family law and inheritance cases because it would offend the *Charter* and perpetuate an imbalance of power in cases of abuse. Others argued that arbitration should be permitted because it is less costly and more effective. Still others submitted that religiously-based arbitration must be permitted because it is protected by freedom of religion, and is integral to a faithful person's life.

In fact, religious arbitration is already being conducted by several different faiths. Although some participants in the Review fear that the use of arbitration is the beginning of a process whose end goal is a separate political identity for Muslims in Canada, that has not been the experience of other groups who use arbitration. As well, Canada's First Nations people are the only minority group that has a defined right to negotiate with the Canadian state about political autonomy.

Canada is a multicultural society and the fundamental tension that must be addressed is between respect for the minority group and protection of a person's individual rights within that minority. The Review found that secular state laws do not treat everyone equally because people's individual backgrounds lead to differences in the impact of these laws. If the state allows cultural groups complete freedom to define family and inheritance matters those groups may trample on the rights of individuals within the group and may discriminate in ways that are unacceptable to Canadian society. The Review concluded that cultural groups should not be permitted to stop people from having access to laws and processes that are available to all.

Summary of Recommendations

1. **Arbitration should continue to be an alternative dispute resolution option that is available in family and inheritance law cases, subject to the further recommendations of this Review.**

2. **The *Arbitration Act* should continue to allow disputes to be arbitrated using religious law, if the safeguards currently prescribed and recommended by this Review are observed.**

Legislative

3. **Section 51 of the *Family Law Act* should be amended to add mediation agreements and arbitration agreements to the definition of "domestic contracts" to bring these agreements into the general protections of Part IV of the Act. Therefore these agreements would be required to be in writing, signed by the parties and witnessed.**

4. **When Part IV of the *Family Law Act* applies, a mediation agreement or arbitration agreement should be able to be set aside on the same grounds as other domestic contracts.**

5. **Part IV of the *Family Law Act* should be amended so that if a co-habitation agreement or marriage contract contains an arbitration agreement, that arbitration agreement is not binding unless it is reconfirmed in writing at the time of the dispute and before the arbitration occurs.**

6. **The reconfirmation in writing should not be required for an arbitration conducted:**

    (a) under a separation agreement;
    (b) as a consequence of an award made in an arbitration that was itself agreed to contemporaneously; or
    (c) as a consequence of a judgment of a court.

7. **Section 55 (2) of the *Family Law Act* should be amended to require prior court approval of a domestic contract entered into by a minor in Ontario.**

8. **Section 33 (4) of Part III of the *Family Law Act*, permitting the Court to set aside a domestic contract or paternity agreement for provision of support, should be amended to permit a court to set aside an arbitral award on the same grounds (unconscionability, person owed support is receiving social assistance, or the support is in arrears).**

9. **The *Arbitration Act* should be amended to permit a court to set aside an arbitral award in a family or inheritance matter if:**

    (a) the award does not reflect the best interests of any children affected by it;
    (b) a party to it did not have or waive independent legal advice;
    (c) the parties do not have a copy of the arbitration agreement, and a written decision including reasons; or
    (d) applicable, a party did not receive a statement of principles of faith-based arbitration.

    The parties should not be able to waive this provision.

10. **The *Arbitration Act* or the *Family Law Act* should be amended to provide regulation-making powers for family law and inheritance arbitrations and to require the use of regulated forms and procedures.**

11. **The *Child and Family Services Act* s. 72 (5) should be amended to explicitly include mediators and arbitrators in the class of professionals who have an enforceable duty to report a child in need of protection.**

Regulatory

12. **Regulations in the *Arbitration Act* or the *Family Law Act* should require that arbitration agreements of family law and inheritance cases must be in writing and must set out:**
    - **a detailed list of issues that are submitted to arbitration;**
    - **whether the arbitration is binding or advisory;**
    - **the form of law, if not Ontario law, which will be used to decide the dispute, and in the case of religious law, which form of the religious law;**
    - **if the arbitration is under religious law, an acknowledgement that the party has received and reviewed the statement of principles of faith-based arbitration prior to signing the agreement;**
    - **explicit details of any waiver of any rights or remedies under the *Arbitration Act*;**
    - **an explicit statement that judicial remedies under s. 46 and the right to fair and equal treatment under s. 19 of the *Arbitration Act* cannot be waived;**
    - **an explicit statement recognizing that judicial oversight of children's issues cannot be waived and that s. 33 (4) of the *Family Law Act* continues to apply; and**
    - **an explicit statement that s. 56 of the *Family Law Act* applies to the agreement and cannot be waived and therefore a party can apply to set the agreement aside for additional reasons including if it is not in the best interests of any children affected by the agreement, there was not full and frank financial disclosure, or a party did not understand the nature or consequences of the agreement.**

13. **Regulations in the *Arbitration Act* or the *Family Law Act* should require arbitration agreements in family law and inheritance cases to contain either a certificate of independent legal advice or an explicit waiver of independent legal advice.**

14. **Regulations in the *Arbitration Act* or the *Family Law Act* should require mediators and arbitrators in family law and inheritance cases to be members of voluntary professional organizations, or fall into an excluded**

class defined by the regulation, in order to have their decisions enforced by Ontario courts.

15. **Regulations under the *Arbitration Act* should define the concept of a fair and equal process in the context of family law or inheritance arbitrations.**

16. **Regulations in the *Arbitration Act* or the *Family Law Act* should require that arbitrators who apply religious law in family law and inheritance arbitrations develop a statement of principles of faith-based arbitration that explains the parties' rights and obligations and available processes under the particular form of religious law.**

17. **Regulations in the *Arbitration Act* or the *Family Law Act* should require religiously-based arbitrators to distribute their statement of principles of faith-based arbitrations to all prospective clients.**

18. **Regulations in the *Arbitration Act* or the *Family Law Act* should require mediators and arbitrators in family law and inheritance cases to screen the parties separately about issues of power imbalance and domestic violence, prior to entering into an arbitration agreement, using a standardized screening process.**

19. **Regulations under the *Arbitration Act* or the *Family Law Act* should require mediators and arbitrators in family law and inheritance cases to certify that they have screened the parties separately for domestic violence, that they have reviewed the certificates of Independent Legal Advice or the waiver of Independent Legal Advice, and are satisfied that each party is entering into the arbitration voluntarily and with knowledge of the nature and consequences of the arbitration agreement.**

20. **Regulations under the *Arbitration Act* or the *Family Law Act* should state that if the records required by Recommendations 37, 38 and 39 are not maintained, a party can apply to have an arbitral award set aside.**

Independent Legal Advice

21. **The certificate of Independent Legal Advice in family law and inheritance cases should state that the party has received advice about the Ontario and Canadian law applicable to his or her fact situation, the law of arbitration, and the remedies available to both parties under Ontario family and arbitration law.**

22. **Arbitration services which conduct family law and inheritance arbitrations should distribute the statement of principles of faith-based arbitrations required under Recommendations 16 and 17 to potential clients, in advance of the clients seeing a lawyer.**

23. If religious law is chosen under the arbitration agreement in a family law or inheritance case, the Independent Legal Advice certificate should explicitly state that the lawyer reviewed the statement of principles of faith-based arbitration and the lawyer is satisfied that the person has sufficient information to understand the nature and consequences of choosing the religious law.

24. Waivers of Independent Legal Advice in family law and inheritance cases should state that the party has waived the right to receive advice about Canadian and Ontario family law and Ontario arbitration law, and if religious law is chosen should state that the party has received and reviewed the statement of principles of faith-based arbitration required by Recommendations 16 and 17.

Public Legal Education

25. The Government of Ontario should develop, in collaboration with community organizations and experts, a series of public education initiatives, aimed at creating awareness of the legal system, alternative dispute resolution options, and family law provisions.

26. The initiatives in Recommendation 25 should be linguistically and culturally designed to suit the diverse needs of different communities, as well as any communications challenges faced by members of the community (e.g. blindness, deafness, etc.).

27. Any public education campaign that is developed should include, but not limit itself to, information on the following topics:

    - General rights and obligations under the law;
    - Family law issues;
    - Alternative forms of dispute resolution;
    - *Arbitration Act;*
    - Immigration law issues; and
    - Community supports.

28. Public legal information programs funded by the government of Ontario should include an overview of the options for resolving a family law dispute, including the arbitration process.

29. Public legal information programs in family law funded by the government of Ontario should be available to all community members who wish to attend, whether or not they have a matter before the court.

30. **Family Law Information Centres should provide information that has been developed by and for specific ethno-cultural communities and in community languages about their rights and responsibilities under Ontario and Canadian law.**

Training and Education for Professionals

31. **The Government of Ontario should work together with professional bodies to develop a standardized screening process for domestic violence for use in family law and inheritance mediations and arbitrations.**

32. **The Ministry of the Attorney General, the Law Society of Upper Canada and LawPro should strike a joint task force to examine the use of arbitration in family law and inheritance cases, to develop and deliver continuing education to lawyers about arbitration and Independent Legal Advice, and to examine the insurance and public compensation issues as they impact on the public interest.**

33. **The Government of Ontario should work with voluntary professional associations for mediators and arbitrators to provide training on issues of power imbalance in family law and inheritance cases, use of the prescribed screening process from Recommendation 18, and the process for an arbitrator to certify the material for a family law or inheritance case as required by Recommendation 19.**

34. **The guidelines of voluntary professional associations for training, conduct and competence of mediators and arbitrators should clearly explain their professional duty to report children in need of protection.**

35. **Voluntary professional associations for mediators and arbitrators should require that in family law and inheritance cases, if mediators practise arbitration during mediation sessions, the agreement to arbitrate must precede the commencement of the mediation, and all the obligations of arbitrators under Recommendations 16, 17, 18 and 19 must be met before the commencement of any arbitration.**

Oversight and Evaluation of Arbitrations

36. **The Ministry of the Attorney General should work with professional organizations to review existing codes of professional conduct and assess whether they apply when a member of a profession conducts an arbitration or mediation.**

37. **Decisions of arbitrators in family law and inheritance cases should be delivered to the parties in writing and include a copy of the arbitration**

agreement, and any attachments required by the regulations. Decisions should include written reasons.

38. The arbitrator in family law and inheritance cases should maintain copies of the decision for a period of at least 10 years.

39. Arbitrators should be required to keep a record of each arbitration in family law and inheritance cases including the names of the parties and their representatives (if any), the arbitration agreement, the certificates or waivers of Independent Legal Advice, any documents filed by the parties, a summary of the facts of the case and the written decision. Copies of these files should be made available to the parties upon request. If an arbitrator does not maintain these files, or make the file available when requested, the arbitral decision may be set aside.

40. Arbitrators of family and inheritance matters should be required to report annually to the Ministry of the Attorney General, the following aggregated and non-identifying information:

- **Number of arbitrations conducted;**
- **Number of appeals or motions to set aside and the outcome, if known (e.g. pending, award set aside, court refers back to arbitrator, etc.); and**
- **Any complaints or disciplinary actions they are aware of that have been taken against them during that year by their professional body or the courts.**

41. Arbitrators in family law and inheritance cases should be required to provide the Government of Ontario with summaries of each decision, free of identifying information, and the Government should make these summaries available upon request for research, evaluation and consumer protection purposes. If in the future arbitrators become a self-regulating profession, the inventory of summaries of decisions should be transferred to the regulatory body for that profession.

42. Voluntary registration organizations should consider failure to make decisions available and file decisions in accordance with Recommendations 40 and 41 grounds for the deregistration of the arbitrator.

Community Development

43. The Government of Ontario should encourage and fund community organizations who run arbitration services to develop information materials about rights and obligations under religious law.

44. **The Government of Ontario should encourage and fund community organizations to work with experienced public legal education providers and the legal community to research and develop effective public information materials which explain rights under Ontario and Canadian law in a way that is likely to be comprehensible to people of diverse backgrounds and culture.**

Further Policy Development

45. **The Ministry of the Attorney General should set a long term goal of professional self-regulation of mediators and arbitrators who deal with family law and inheritance cases. The Ministry should work with professional organizations including the Law Society of Upper Canada and voluntary mediation and arbitration organizations to develop a consultation process which will lead to guidelines for conduct and competency for these professionals.**

46. **The Ministry of the Attorney General should conduct further policy analysis of the legality and desirability of providing a higher level of court oversight to settlements of family and inheritance cases based on religious principles than is available to non-religiously based settlements under Part IV of the *Family Law Act* in addition to the several additional grounds set out in these recommendations under which arbitral awards may be challenged.**

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December 2004

by Marion Boyd

December 20th, 2004

The Honourable Michael Bryant
Attorney General
720 Bay Street, 11th Floor
Toronto, Ontario
M5G 2K1

The Honourable Sandra Pupatello
Minister Responsible for Women's Issues
400 University Avenue, 6th Floor
Toronto, Ontario
M7A, 2R9

Dear Attorney General and Minister Responsible for Women's Issues:

With this letter I transmit the report of my review of arbitration of family law and inheritance matters and its impact on vulnerable people. I look forward to an opportunity in the New Year to discuss my recommendations with you.

Yours very truly,

Marion Boyd

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Section 1: Introduction and Structure

This Review began as a result of developments that came to public attention in the fall of 2003.[1] After more than twenty years of effort, Syed Mumtaz Ali, a retired Ontario lawyer determined to ensure that Islamic principles of family and inheritance law could be used to resolve disputes within the Muslim community in Canada, announced that a new organization, the Islamic Institute of Civil Justice (IICJ), had been established. The Institute would be conducting arbitrations according to Islamic personal law. According to Mumtaz Ali these services would be offered to the Muslim community of Ontario in the form of a "Sharia Court" authorized by the *Arbitration Act, 1991*.

In initial comments to the media in late 2003 Syed Mumtaz Ali, president of the IICJ, stated, "[n]ow, once an arbitrator decides cases, it is final and binding. The parties can go to the local secular Canadian court asking that it be enforced. The court has no discretion in the matter. The…impracticality [not being allowed to use Sharia] has been removed. In settling disputes, there is no choice but to have an arbitration board."[2] His statement went on to suggest that, once the "Sharia Court" was available to Muslims, they would be required, as part of their faith position, to settle disputes only in that forum, if they were to be regarded as "good Muslims." The Institute proposed that it would offer memberships to Muslims, who would then be bound to settle personal disputes only in this forum, without recourse to the courts of Canada and Ontario. However, the statement also emphasized that the "Sharia Court" would be bound by the laws of Canada and Ontario, as it is a requirement for Muslims living in non-Islamic countries to obey the laws of their country of residence.

These announcements, and the subsequent media interviews which discussed the issue of arbitration in the context of family and inheritance law, raised acute alarm throughout Ontario and Canada. In particular, there was intense fear that the kind of abuses, particularly against women, which have been exposed in other countries where "Sharia Law" prevails, such as Afghanistan, Pakistan, Iran, and Nigeria, could happen in Canada.[3] A related fear, expressed by many groups throughout the Review was that the many years of hard work, which have entrenched equality rights in Canada, could be undone through the use of private arbitration, to the detriment of women, children and other vulnerable people.

In these initial statements by the IICJ were born some persistent myths about arbitration in Ontario. Many people had not been aware that the *Arbitration Act* could be used to settle family law and inheritance disputes, or that if an arbitration award were made under the Act, it could be enforced by Canadian courts. Syed Mumtaz Ali's statements, and the statements of members of the Muslim community who took a position supporting the IICJ proposal, suggested that the government had given some form of special permission to the IICJ to undertake its project. The idea that government had approved the use of Sharia began winding its way into the public consciousness. The mistaken belief that the government had recently made changes to the law on arbitrations was widely disseminated through the public press and electronic media.[4]

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[1] Judy Van Rhijn, 'First steps taken for Islamic arbitration board' *Law Times* (24 November 2003).

[2] Cited in Judy Van Rhijn, 'First steps taken for Islamic arbitration board' *The Toronto Star* (25 November, 2004), online: <www.thestar.com>.

[3] Joanne Lichman (The National, CBC Television, 8 March 2004).

The idea that the IICJ legitimately held some form of coercive power which would allow it to force Muslims in Ontario to arbitrate according to Islamic personal law instead of using the traditional court route to resolve disputes was formed as a direct result of the pronouncements of the IICJ. That this declaration appears to have been taken at face value by both the Muslim community and the broader community is particularly troublesome. Further, the IICJ's false contention that arbitration decisions are not subject to judicial oversight was propagated by a misunderstanding of the law on the part of the community, the media, and of course, the IICJ itself. Finally, the IICJ position that "good Muslims" would avail themselves exclusively of Muslim arbitration services effectively may have silenced opposition among those who consider themselves devout.

Media reports which unquestioningly accepted these misunderstandings as self-evident truths did not help to clarify the issue.[5] More accurate, less alarmist reporting was largely marginal to the Canadian mainstream.[6] In fact, no government had made any changes to the *Arbitration Act* since its passing into law in 1992. Prior to 1992 private arbitration was legal in Ontario under the previous *Arbitrations Act*[7] and family matters have been arbitrated based on religious teachings for many years in Jewish, Muslim and Christian settings.

Alarmed by the perceived implications of the IICJ's announcement, a number of Ontarians sought to bring the issue to the attention of the government. In March and April 2004 members of the Canadian Council of Muslim Women (CCMW) and the International Campaign Against Shariah Law in Canada each met with government officials to discuss their concerns. Officials took the position that since the IICJ was using the *Arbitration Act* to provide a framework for voluntary private arbitration, there was no clear role for government to intervene to stop the proposal from proceeding.

Concerns were also brought to the attention of the Law Society of Upper Canada (LSUC), both as the regulator of Ontario's legal profession, and as a group that might speak out about the need for judicial oversight of arbitration decisions. The Access to Justice Committee of the LSUC considered the available information and the issues raised; the Equity and Aboriginal Affairs Committee of LSUC then debated the matter in an effort to determine what action, if any, the Society might take to bring the concerns of the legal profession to the attention of government. Groups like the National Council of Women, the National Association of Women and the Law, and the Canadian Federation of University Women Clubs raised their concerns in a variety of ways. At the same time, members of the public, hearing and being concerned about news reports, started contacting their local MPPs, the Attorney General and the Minister Responsible for Women's Issues.

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[4] See for example: Lynda Hurst, 'Ontario Shariah tribunals assailed' *The Toronto Star* (22 May 2004), online: <www.thestar.com>.

[5] Lynda Hurst, 'Ontario Shariah tribunals assailed' *The Toronto Star* (22 May 2004), online: <www.thestar.com>; Lynda Hurst, 'Protest rises over Islamic law in Toronto' *The Toronto Star* (8 June 2004), online: <www.thestar.com>.

[6] Laura Trevelyan, 'Will Canada introduce Shariah law?' *BBC News*, online: < http://newsvote.bbc.co.uk>; Clifford Krauss, 'When the Koran speaks, will Canadian law bend?' *The New York Times* (4 August 2004) A4; Faisal Kutty & Ahmad Kutty, 'Shariah courts in Canada: myth and reality' *The Law Times* (31 May 2004) 7; 'Some Canadians may use Shariah law' *AlJazeera.net, online:* < http://english.aljazeera.net>.

[7] *Arbitration Act* S.O. 1991 c.17.

It bears repetition that, in spite of perceptions to the contrary, the government had not amended or introduced any legislation or regulations that allowed the IICJ to conduct arbitrations according to Islamic personal law. Rather, the structure of the *Arbitration Act* itself created this possibility. In fact, the government had never been in contact with or heard of the IICJ until early 2004. Given that the IICJ was simply using the *Arbitration Act* in the manner in which it was intended, as a framework for the provision of private arbitration services, there was no reason for the government to be notified of its intention to set up business in Ontario. The IICJ was proposing to use the *Arbitration Act* in the same manner as it is being used by countless other businesses and organizations in Ontario to arbitrate private disputes.

Nonetheless, the increasingly strong concerns of Muslim women's groups, advocates for women and legal stakeholders about the implications of using the *Arbitration Act* for family law and inheritance matters at all, and in particular, allowing the principles of religious laws to prevail in these arbitrations, led the Premier to ask formally for the advice of the Attorney General, Michael Bryant, and the Minister Responsible for Women's Issues, Sandra Pupatello, (the Ministers) about this issue. Soon afterward, the Ministers sought my assistance in speaking to affected communities.

In June of 2004 the Ministers gave me a mandate to explore the use of private arbitration to resolve family and inheritance cases, and the impact that using arbitrations may have on vulnerable people. My mandate included extensive consultation with interested parties. In particular, my Review was to include an examination of the prevalence of the use of arbitration in family and inheritance disputes, the extent to which parties have resorted to the courts to enforce arbitration awards, and what differential impact, if any, arbitration may have on women, elderly persons, persons with disabilities, or other vulnerable groups. Finally, based on my consultations, I was asked to make recommendations for addressing some of the central concerns about arbitration of family law and inheritance matters in this province. (See Appendix I) Consequently I set out to meet with as many interested people as I could, hoping to canvass a broad range of views. During the course of the Review I met with close to 50 groups, and spoke with numerous individuals, both in person and by phone. (See Appendix II) From July through September of 2004 I met with representatives from a variety of women's organizations including immigrant organizations and groups dealing with domestic violence, representatives and organizations from the Muslim, Jewish and evangelical Christian communities, legal organizations and family lawyers, public legal education organizations, scholars, religious leaders, and private individuals. As well, I received countless letters and submissions from concerned citizens across Ontario, and beyond, which I read with care. The degree of concern about the use of religious principles in the arbitration of family law and inheritance cases in Ontario, and the attention this issue has received, in Ontario, in Canada, and around the world, has only served to heighten my awareness of the need to address the issue in a comprehensive and constructive manner. This report represents my best efforts to do so. I am deeply grateful for the time, effort and thoughtfulness so many respondents shared with me and will try to do justice to the concerns they raised and the many suggestions they put forward to address these issues.

I am equally grateful for the invaluable assistance of a number of people, without whom this Review would not have been possible. John Gregory, Juliette Nicolet, Anne Marie Predko, and other staff of the Ministry of the Attorney General have given unstintingly of their expertise, their advice and their wisdom about the issues of family law and inheritance laws, the evolution and provisions of the *Arbitration Act* itself, the appropriate consultation with the legal community and possible changes that might resolve some of the serious concerns raised throughout the Review process. Shari Golberg, Payal Kapur, and other colleagues in the Ontario Women's Directorate facilitated meetings with the women's groups concerned, provided expertise around specific issues such as violence against women, and shared their insights about public and professional education needs with respect to family law and arbitration issues. Finally, I would like to thank Bernie Henry and Sarah Perkins for their technical support and assistance in the creation of this report. While I am deeply indebted to these colleagues for their unfailing patience, vigorous challenges, and hard work, I am solely responsible for this Report and any errors or omissions it might contain.

Structure of the Report

In order to address properly the various issues raised during the course of the Review, I have divided this Report into a number of sections. The first section includes the introduction and outline of the structure of the Report. Section two discusses the *Arbitration Act* itself, as it is clearly central to the Review, being the piece of legislation which enables private disputes to be resolved through arbitration. First, I will discuss the historic use of arbitration in this province and the development of the *Arbitration Act* itself. Next, this section will set out the limitations of arbitration, the basic safeguards provided by the *Arbitration Act*, and the basic principles governing arbitrations in Ontario. Finally it will address the legal, procedural, and substantive limits on the use of arbitration including judicial review of arbitration decisions.

This report would be incomplete without canvassing the family law and inheritance law in Ontario and Canada and section three will deal with these background areas. First I explain the division of responsibility over family law issues between the federal and provincial governments. Since the preamble to the *Family Law Act* contains a clear statement of gender equality in the settlement of relationship breakdown, it merits discussion. Beyond this, the report will look at individual's rights upon separation or divorce, children's custody and access, defining the best interests of the child, international child abduction, polygamy, domestic contracts under Part IV of the *Family*

Law Act, and testate and intestate successions law. Each of these areas must be considered in order to understand the implications of the use of religious principles in family law and inheritance law arbitrations.

Section four will set out the wide variety of opinions and concerns which were expressed by groups and individuals who shared their views during the Review. I will summarize the arguments presented, as providing the full text of each participant's contributions would be much too lengthy for a report of this kind. The section will group the presentations under common themes and concerns. The report will also include an examination of relevant constitutional considerations resulting from contributors' submissions.

In section five, I hope to explain what may be the limits of applicability of the *Charter* and the policy considerations surrounding the freedom of religion, the multicultural and the equality clauses as these have been raised by participants to the Review, and have been understood by the courts and by government.

Making sense of the issue equally requires a considerable degree of analysis of some of the deeper questions that were raised in the Review. These questions go to the core of who we are as a society. As a result, section six of the report is dedicated to examining the following topics:

a) a brief historical overview of religiously based personal law;
b) the notion of separation of church and state, and the meaning this phrase has in Canada on both the legal and social levels;
c) the possible role and impact of identity politics with respect to the issues;
d) the tension between multiculturalism and equality rights including the rights of individuals within minorities;
e) the relation of Ontario's public policy priorities with respect to violence against women and children and the use of private arbitration to deal with family law issues;
f) the potential impact of arbitration decisions on the impoverishment of women and children;
g) the access to justice issues inherent in allowing private legal processes.

Section seven will include concrete suggestions from participants for policy, legislative and regulatory reform. As well, I address the need for public education about the issues raised in the review, among specific religious and political groups as well as the broader community. I explore what the responsibility of the government and the various interest groups involved must be in order for the issues to be understood and the interests of vulnerable people to be addressed appropriately.

The final section will set out my conclusions and recommendations for the Attorney General, Michael Bryant, and the Minister Responsible for Women's Issues, Sandra Pupatello, to address the difficulties raised by the use of arbitrations to resolve matters of family law and inheritance. These include recommendations for legislative and regulatory change, as well as for non-legislative action, such as increased public and professional legal education.

A brief comment on style and spelling is likely in order. Although the text of the Review Report observes consistent rules of style and spelling, many of the submissions to the Review did not. In an effort to give respondents a recognizable voice, I have not altered the style or spelling in the quotations from the submissions but rather have let them stand as they were presented to me.

Section 2: The Law and Practice of Arbitration

The following section of my report provides an overview of the *Arbitration Act* itself. It was very clear during the consultations that, although many of the participants had made an effort to read the Act, many had misconceptions about how it would apply in practice. This Section attempts to lay out the legal context within which the *Arbitration Act* operates. As well, it will explain specific sections of the *Arbitration Act* in order to clarify what rights and obligations exist under it.

Private and public dispute resolution

As with any law, it is important to understand how the law of arbitration is engaged. Arbitration disputes are like all legal disputes, in that arbitration is triggered only by the parties who wish to use the law to resolve a dispute. Similarly, if the arbitration process has contravened the Act or has infringed on the rights of the parties, the person who has the problem must go to the court to seek a remedy. People with complaints about other people's behaviour generally must bring a claim to the courts (or tribunals) and ask for help. The state does not have agents going throughout society looking for wrongs to set right, except in the case of crimes and health and safety inspections and, arguably, in child welfare matters. People are expected to look out for themselves, and at the same time are allowed to resolve disputes privately if they so choose. The state provides dispute resolution mechanisms (courts and specialized tribunals), but it does not know who needs or who wants those services unless people come forward and make use of them.

People who live together in any kind of society inevitably find themselves in disputes with other people: with family, friends, neighbours, employers, businesses or governments. They also find a wide range of methods of dealing with these disputes. They may ignore them or walk away from them. They may resolve them directly between parties, by informal discussion or by formal negotiation or by arbitrary measures, like flipping a coin. They may involve other people not personally involved in their dispute, such as professional advisors for each disputant. The parties may get independent help in resolving the dispute, by asking advice of a neutral third party. They may ask a third party to be more or less actively and more or less formally involved in helping them come to an agreement, a process known as mediation.

The disputants may also give up on the quest for an agreed resolution to the dispute, and choose instead to have a neutral third party decide the dispute. When this is done by agreement of the parties to the dispute, it is known as arbitration. The parties agree to abide by the decision of the arbitrator, even if they do not agree with the decision itself. In short, they agree on a process, not on a result. These techniques, and others such as mini-trials, mock trials, early neutral evaluation and others are often referred to as "alternative dispute resolution" or ADR. "Alternative" means an alternative to the court system. The key way to classify them is whether the parties to the dispute agree on a resolution or whether someone else decides the dispute for them.

All of these methods are private; they do not depend on "the law" to make them work, and they do not involve any governmental or state action. If they work, they work because the disputants have agreed on a resolution or on a process for arriving at one. The government never hears about them (unless it is a disputant) and is not called upon to do anything about them, unless a further dispute brings the matter before the courts. Civil society functions independently of government.

Government – the state – has a number of interests in having civil society function independently. It has a principled interest in the peaceful resolution of disputes and in having the adult population take responsibility for its actions. It has a practical interest in seeing disputes resolved outside the official state institutions for resolving disputes. Private resolution reduces the workload of the court system and may tend to reserve the courts, with their highly trained judges, for the hardest cases, those that private dispute resolution fails to resolve.

Individuals also have a number of interests in resolving their disputes outside the civil court system. Private resolutions are likely to be more satisfactory to the disputants and thus more durable, because the parties have made them themselves and been able to tailor them to their needs more than a court is able to do. In addition, private methods are usually also private in the sense of avoiding publicity. The fact or the details of disputes can be embarrassing to both parties. Private methods are also less rigid than court processes, being more flexible as to time, procedure, and possible outcomes. They may be considerably cheaper and faster than court.

For all these reasons, the government has taken steps to encourage private resolution of disputes. As a result of the Civil Justice Review process which took place in the mid-1990's in Ontario, most civil disputes are required to go for mandatory mediation prior to going to court; the only exception is in the case of family law, where mediation continues to encouraged, but not required. The best-established sign that the government encourages private dispute resolution is the statutory help it gives to the conduct of arbitrations. It offers procedural rules for arbitrations, it directs the courts to help choose an arbitrator if the disputants cannot agree on one, and it allows the decisions of private arbitrators to be enforced by the civil courts.

The History of Arbitration in Ontario

In 1990 the Uniform Law Conference of Canada, a federal-provincial-territorial law reform and harmonization body, adopted a Uniform Arbitration Act and recommended its adoption by the provinces and territories.[8] Ontario was among the first to adopt the

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[8] The principles of the reform are reported in the Law Reform Commission of Canada *Proceedings of the Seventy-First Annual Meeting* (Law Reform Commission of Canada, 1989), online: <http://www.bcli.org/ulcc/proceedings/1989.pdf> and in the Law Reform Commission of Canada *Uniform Arbitration Act* (Law Reform Commission of Canada, 1990), online: <http://www.ulcc.ca/en/us/arbitrat.pdf>

Uniform Act; seven provinces in all have now adopted it.[9] Since 1992, the law is the *Arbitration Act*, 1991.[10] The basic principle is that parties who have agreed to resolve their dispute by following the decision of a voluntarily chosen third party are held to the agreement.

The Uniform Arbitration Act was inspired by an evolution in attitudes to arbitration. Essentially the changes reflected an increased perception of the legitimacy of arbitration as a method of dispute resolution and greater trust in the ability of arbitrators to make a range of decisions. The new legislation reduced the discretion of the court in supervising (or, as some people saw it, interfering with) arbitrations. Court discretion was reduced both in the area of stopping litigation when parties had agreed to arbitrate, and in enforcing awards.

The Uniform Arbitration Act is not limited to commercial arbitrations, nor is Ontario's version of it, the *Arbitration Act*. Ontario's old *Arbitrations Act*, dating from the nineteenth century, also applied to all arbitrations, not merely to commercial disputes.[11] In particular, the old and the new statutes apply to arbitration of family law and inheritance disputes. Disputes among family members are often matters of personal sensitivity that the disputants make an effort to resolve privately. The law does not prevent them from making private arrangements to do so.[12]

The law of arbitration

The Review was witness to the way people may disagree about whether it is better social or justice policy to compel people to use the courts to resolve some kinds of civil disputes, rather than allowing them to use a private mechanism such as arbitration. A tension between protection of the vulnerable and a degree of paternalism that involves controversial assumptions about vulnerability is inherent in this discussion.

As with all methods of private dispute resolution, disputants use arbitration because they want to. If the parties do not agree to arbitrate, the arbitration does not happen. The government provides a dispute resolution system for those who do not want to use another (or any) method, namely the court system.[13]

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[9] The seven are Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Prince Edward Island and Nova Scotia.

[10] S.O. 1991 c.17, online: < http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/91a17_e.htm>.

[11] British Columbia adopted its *Commercial Arbitration Act*, 1986, c. 43, now R.S.B.C. 1996, c. 55 in 1986. Despite its name it too applies to all arbitrations, but it gives the courts more discretion to refuse to enforce an arbitration agreement or an award than does the Uniform Act.

[12] There are some limits to what family matters can be resolved privately. Limitations are discussed below. There is more on arbitrating family disputes in the family law discussion later in this report, as well.

[13] The court system is mandatory in the sense that one party can compel another party to respond to a claim brought in court. At least one of the disputants has to choose to go to court. Generally speaking, nothing requires disputants to go to court if none of them wants to.

Arbitration is based on a contract. The law refers to it as an arbitration agreement.[14] That contract is itself enforceable. In other words, once a party does truly agree to arbitrate, the law enforces the contract even if the party changes his or her mind and the other party still wants to follow it. As with any contract, if both parties change their minds, then the contract can be changed, ignored or terminated.[15] The Arbitration Act enforces the agreement by stopping ("staying") any court action brought on a dispute that the parties have agreed to arbitrate.[16] The arbitration can continue even if one party refuses to participate, and it can result in a decision ("award") enforceable like a judgment.

The Act applies to all arbitrations except those that it excludes, which are those with special statutes to govern them such as labour arbitrations or international commercial arbitrations. It provides rules of procedure in case the parties have not done so. Generally speaking, the parties are free to set up any procedure they like, and their agreement will prevail over the Act. There are some limits to this, which are discussed in the section on limits to arbitration, below. This flexibility makes arbitration more attractive to many parties.

One area of flexibility is the choice of arbitrator. The Act does not state any qualifications for a person to be an arbitrator – the disputants may choose anyone with whom they are comfortable. The parties can decide if training or experience as an arbitrator is important to them. The only rule in the Act is that the arbitrator should be neutral as between the parties,[17] and the parties can agree to change that. (The usual time they would change that is if each party were appointing his or her own arbitrator, and the two party appointees appoint a neutral chair – resembling what happens in labour arbitrations.)

The court can appoint an arbitrator if the parties cannot agree, or if one party refuses to participate. Awards of the arbitrator are to be in writing and to state reasons for the award.[18] The arbitrator must decide according to the law, unless the parties agree otherwise.[19] The Act expressly allows the parties to choose what rules of law may apply, and if they do not specify what law applies, the arbitrator can choose the appropriate law.[20] For parties based in Ontario, that would normally be Ontario law.

The drafters of the *Arbitration Act* had in mind a choice of law of some other place than Ontario. However, the language of the Act is consistent with a choice of a different type of law, such as a religious law or even a set of rules made up by a private organization or by the parties themselves to govern their relationship. Since the arbitration happens only because the parties want it to happen, they can design this part of the process along with the others. They can choose an arbitrator based on his or her experience with the law they have chosen, if they wish.

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[14] *Arbitration Act,* 1991, s. 2.

[15] *Arbitration Act*, 1991, s. 5(5): "An arbitration agreement may be revoked only in accordance with the ordinary rules of contract law."

[16] *Arbitration Act*, 1991, s. 7.

[17] *Arbitration Act,* 1991, s. 11(1). S. 46(1) gives as a ground for setting aside an award that there was a reasonable apprehension of bias on the part of the arbitrator.

[18] *Arbitration Act,* 1991, s. 38.

[19] *Arbitration Act,* 1991, s. 31.

[20] *Arbitration Act,* 1991, s. 32(1).

The decision of an arbitrator is called an arbitral award. Once the award is made, if a party who is ordered to do something does not do it, the other party may apply to the court for an order enforcing the award because the parties contracted to be bound by the results of the arbitration.[21] This is true of awards made elsewhere in Canada as well. (Foreign arbitral awards have a similar but not identical regime under a different statute.[22]) The court is required to give such an order unless there is an appeal or an application to set aside an award, or still time to appeal, or unless an appeal has succeeded and the award has been overturned. The arbitrator can award costs to the winning party, as in a lawsuit,[23] and the court can enforce this part of the award along with the rest of it. If there is no order about costs, the parties split the cost of the arbitration equally.[24]

Limits to arbitration

Although the policy of the *Arbitration Act* is to favour arbitrations and generally to trust the arbitral process, the law does not blindly assume that private decisions are as good as decisions of the public court system. It imposes a number of limits and safeguards on the process that can prevent a dispute from being arbitrated or an award from being enforced. These constraints are legal, procedural and substantive.

(i) legal limits

The main legal limit is that the arbitration must be voluntary. Private dispute resolution occurs only because the parties have agreed to it. The arbitrator gets his or her powers from the parties, with the statute playing a supplementary – and sometimes protective - role. An arbitrator has no power to order the parties to do something that the parties could not have agreed to do on their own. Likewise the arbitrator cannot order the parties to do something illegal under Canadian law (since the parties cannot lawfully agree to break the law). So, for example, the arbitrator could not allow the parties to engage in conduct prohibited by the *Criminal Code*, or any other statute.

The arbitration agreement is a contract between the parties, and it is enforceable at law to no greater extent than any other contract. This is clear from the grounds on which a court can refuse to stay litigation, or can set an award aside: that a party entered into the agreement while under a legal incapacity (such as being under age, or subject to duress, or mentally incompetent), or that the agreement is invalid for another reason of law.[25]

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[21] *Arbitration Act*, 1991, s. 50.

[22] *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9.

[23] *Arbitration Act*, 1991, s. 54.

[24] *Arbitration Act*, 1991, s. 54(4).

For this reason, an arbitration agreement cannot bind children; they are not capable of contracting, i.e. agreeing to arbitrate. It may bind parents in matters concerning their children, but as noted below, the courts will always maintain their right to ensure the best interests of the child, whatever the parents have agreed to directly or through an arbitration.

Likewise, an arbitrator can decide only the questions that the parties have agreed to refer to arbitration. The contract fixes the scope of the arbitrator's power. A court may refuse to let an arbitration proceed if the arbitrator purports to deal with matters that the parties have not agreed to arbitrate, and the court may set aside an award made in excess of the agreement.[26]

Another legal limit, one that makes an arbitration agreement less enforceable than other contracts, is that the subject matter of the agreement must be "capable of being the subject of arbitration under Ontario law". Most civil (i.e. between private parties) disputes may be arbitrated. However, criminal offences are not disputes between parties but matters between the state (the Crown) and the offender. They cannot be arbitrated. Likewise matters that involve a public recognition of civil status cannot be altered by a private arrangement. The parties can decide through an arbitrator only their own private affairs. For example, the registration of a patent, the recognition of parenthood (affiliation), or the status of marriage cannot be arbitrated. Therefore, arbitrators cannot grant a civil divorce. Only a public body, a court, can make an order affecting this public status. This does not affect the authority to grant a religious divorce. This power may be exercised as religious authorities determine. Civil divorce occurs only under the *Divorce Act (Canada)* and is not arbitrable. An award purporting to have such an effect can be set aside, or simply ignored.

(ii) procedural limits

The parties cannot waive the power of a court to enforce awards.[27] However, they may waive or vary section 37, which says that an award binds the parties. In other words, the parties can make the arbitration advisory only. If they do this, then the appeal rights (which are separately waivable, as noted below) and the enforcement rights of the *Arbitration Act* would logically not apply to any award. The other substantive and procedural protections would still benefit the parties, however.

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[25] *Arbitration Act*, 1991, ss. 7, 46(1).

[26] *Arbitration Act*, 1991, s. 48. See also s. 6, which gives as one reason a court may intervene in an arbitration "to ensure that arbitrations are conducted in accordance with arbitration agreements."

[27] *Arbitration Act*, 1991, s. 3.

The arbitration must be conducted fairly and the parties must be treated equally.[28] The parties cannot opt out of this obligation.[29] As a result, each party must be given a fair opportunity to present a case and to respond to the case of the other party. Likewise the parties must both be given proper notice of the arbitration and any significant steps in it. Otherwise the courts can set aside any award made by the arbitrator.

The time limits prescribed in the *Arbitration Act* for rendering an award can be extended by the court, to ensure that the arbitration proceeding has a meaningful conclusion.[30] The parties cannot deny the court this power to extend the time.[31]

The courts may also set aside an award that was obtained by fraud or if the arbitrator is or reasonably appears to be biased.[32] The grounds on which an award may be set aside -- essentially the contractual grounds mentioned above and the procedural grounds mentioned here – may not be contracted out of by the parties.[33]

The *Arbitration Act* allows a party who claims not to have agreed to arbitrate to invalidate any purported arbitration without participating in it first.[34] This rule too cannot be eliminated by agreement.[35]

The *Arbitration Act* also allows the parties to agree to appeals to the court on questions of law or on questions of fact. If the agreement does not provide for appeals, a party may still appeal on questions of law, but only with permission of the court.[36] The party seeking to appeal must persuade the court of the importance of the appeal. The arbitration agreement may rule out any appeals at all.[37] It may be difficult for an Ontario court to decide an appeal where the arbitrator has decided under a law other than Ontario's. The usual course would be to have the appropriate non-Ontario law proved to the court as a matter of fact. The appeal court can make its own decision or send the award back to the arbitrator to get it right, or to conduct the arbitration in a particular way.[38]

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[28] *Arbitration Act*, 1991, s. 19. See also s. 6, which gives as another reason a court may intervene in an arbitration "to prevent unequal or unfair treatment of parties to arbitration agreements."
[29] *Arbitration Act*, 1991, s. 3.
[30] *Arbitration Act*, 1991, s. 39.
[31] *Arbitration Act*, 1991, s. 3.
[32] *Arbitration Act*, 1991, s. 46(1).
[33] *Arbitration Act*, 1991, s. 3.
[34] *Arbitration Act*, 1991, s. 48.
[35] *Arbitration Act*, 1991, s. 3.
[36] *Arbitration Act*, 1991, s. 45.
[37] The *Arbitration Act*, 1991, s. 3, does not include s. 45 in the non-waivable provisions. Ontario differs from the Uniform Arbitration Act in this respect; the Uniform Act does not allow parties to opt out of appeals on questions of law, with leave of the court.
[38] *Arbitration Act*, 1991, s. 45(5).

In addition, the court cannot enforce an award if the award may still be appealed or if an application may be brought to set it aside, or if an appeal or application is outstanding or has succeeded.[39]

(iii) substantive limits

The power of the court to enforce an award is subject to some other limits. At least one Ontario court has interpreted the obligation to treat the parties equally and fairly as not limited to procedural fairness but even-handed in substance.[40]

Ontario courts have refused to enforce an arbitral award dealing with the custody of children, not on the ground that the children were not a party to the arbitration agreement, but because the court has a general jurisdiction (a "*parens patriae*" jurisdiction) to oversee the treatment of children and to ensure that their best interests are protected.[41]

A fraudulent order could be set aside under the *Arbitration Act*.[42]

The court may refuse to enforce any order that it would not have had jurisdiction to make itself or would not have granted.[43] Courts order people to pay money or transfer property to someone else, or to do or refrain from doing things according to their agreements, or to act honestly. They do not go much further.

The Act does not expressly give the court any right to review the merits of the award, in the absence of an appeal. There is no power to refuse enforcement on grounds that the award violates "public policy", however that might be defined. Nevertheless, the power to refuse enforcement under s. 50(7) noted above refers to an order that the court "would not have had jurisdiction to make itself". Jurisdiction has been a very flexible tool among judges who did not want to enforce another tribunal's order.

It may be noted that other laws may protect the participants in arbitration. The most recent example is the *Consumer Protection Act, 2002*,[44] which prevents a consumer from agreeing to arbitrate certain kinds of disputes until the dispute has arisen. The consumer, like anyone else, may waive or compromise his or her rights, but the Act requires that he or she be aware of the dispute, and thus in a better position to evaluate how his or her rights might be affected, before agreeing to do so.[45]

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[39] *Arbitration Act*, 1991, s. 50(3).

[40] *Hercus v. Hercus*, [2001] O.J. No. 534 (Sup.Ct.).

[41] *Duguay v. Thompson-Duguay*, [2000] O.J. No. 1541, 7 R.F.L. (5th) 301 (Sup. Ct.) at para. 41.

[42] *Arbitration Act*, 1991, s. 46(1) at para. 9.

[43] *Arbitration Act*, 1991, s. 50(7).

[44] S.O. 2002, c.30, Sch. A., s. 7, online: <http://www.elaws.gov.on.ca/DBLaws/Statutes/English/02c30_e.htm>.

[45] The British Columbia Law Reform Commission's Report on Arbitration (1982) recommended that the choice of a law other than B.C. law to govern an arbitration should be not be made until after a dispute had arisen, so the parties would better be able to estimate the consequences of that decision, and possibly be more equal in bargaining power about the rules of the arbitration than when they had agreed to arbitrate. Until the reforms of the 1980s, Quebec law

(iv) A limit to the limits

Some of the protections mentioned in this section must be exercised promptly or the party will lose the ability to assert them.[46] If an arbitrator is moving to decide matters that are outside the scope of the agreement, for example, the party who does not want this to happen must complain within a reasonable time.

These rules intend to ensure that when the parties have agreed to arbitrate, they carry out the process expeditiously. If the arbitration is to be stopped in favour of litigation, it must be stopped when the grounds for stopping it arise, not when the award goes against the complaining party. If a party participates in the arbitration despite knowing of a defect of jurisdiction or bias, then he or she can lose the right to complain on that ground. However, an objection on the ground of unfair treatment is not lost in this way.[47]

An application to set an award aside must be brought within 30 days of the award.[48] If a party did not know of the award, this limit would not apply. Likewise the limit does not apply if the award is fraudulent.[49] An application to enforce an award must be brought within two years of the date of the award.[50]

Summary

Generally our society accepts that its members may resolve their disputes without recourse to state-sponsored mechanisms like the courts. Arbitration is one method of private dispute resolution. Like the others, it depends on the agreement of the disputants for its legitimacy. The law recognizes this legitimacy by providing for public enforcement of the private decisions, but only subject to a number of legal, procedural and substantive protections. The law of arbitrations permits people to arbitrate family law and inheritance disputes, though not matters of civil status or affiliation. It also permits people to choose any rule of law, or none, by which the dispute is to be resolved.

Does this system sufficiently protect people whose status, language, education, understanding of the law, or other characteristics make them vulnerable to inappropriate resolution of their disputes? Should new types of protection be built into the system for matters of family law or for faith-based dispute resolution in general? These are the essential issues that this Review addresses.

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did not allow the parties to submit a dispute to arbitration at all until the dispute had arisen. British Columbia Law Reform Commission *Report on Arbitration* (British Columbia Law Reform Commission, 1982).

[46] *Arbitration Act*, 1991, s. 4.

[47] *Arbitration Act*, 1991, s. 46(4) – (6).

[48] *Arbitration Act*, 1991, s. 47.

[49] *Arbitration Act*, 1991, s. 47(2).

[50] *Arbitration Act*, 1991, s. 52(3).

Section 3: Family and Inheritance Law

In this section, I will set out aspects of family law that are relevant to the concerns raised during the course of my Review. I also hope to provide some background regarding the basic aspects of Ontario's family law regime.

Federal/Provincial jurisdiction

Family law is an area of shared jurisdiction between the federal and provincial governments. This division of responsibility is a result of the division of powers contained in sections 91 and 92 of the *Constitution Act, 1867*. Section 91 sets out the areas of exclusive federal jurisdiction, including marriage and divorce. Section 92 sets out the areas of exclusive provincial jurisdiction and includes the solemnization of marriage, and property and civil rights in the province.[51]

The federal *Divorce Act* applies not only to married people who want a divorce, but also to the custody, access, child and spousal support claims they make as part of the divorce.[52] Provincial law applies to all other family law matters. This includes the separation (as distinct from divorce) of married or unmarried couples, custody, access, support, division and possession of property, restraining orders, and related issues of child protection and enforcement of orders. Both the federal *Divorce Act* and the Ontario *Family Law Act* (FLA) explicitly permit mediation; however, neither of these acts discuss arbitration.[53]

When adults separate, the family law that applies to them and their children is determined by their marital status. Married people have the option of using the federal *Divorce Act* to apply for a divorce. They can use this same statute to establish their custody, access and support rights. Common law couples and married couples who choose not to divorce must turn to the provincial *Children's Law Reform Act* (CLRA) to determine custody and access, and the FLA for child and spousal support.

Division of Property

Provincial family law varies across the country, particularly in the area of division of property. In Ontario, property division deals with determining which property is shared, on what terms, whether people can contract out of provincial family law regimes, and how much discretion the court has to vary a presumptive "50/50" sharing of property to achieve a "fair" result. Not all provinces require the sharing of all property and most do not provide for property sharing between unmarried partners.

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[51] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, s. 92, reprinted in R.S.C. 1985. App. II, No. 5.

[52] *Divorce Act*, R.S. 1985, c.3, (2nd Supp.).

[53] *Divorce Act*, R.S. 1985, c.3, (2nd Supp.), s. 9(2), *Family Law Act*, R.S.O. 1990 c.F.3, s. 3.

Ontarians have reason to be proud of the advances for women's equality that have been achieved through property regimes in this province. Ontario's statutes contain some of the strongest legislative statements about gender equality in Canadian law. For instance, the preamble of Ontario's *Family Law Act* states:

> Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of spouses upon the breakdown of their partnership, and to provide for other mutual obligations in family relationships, including equitable sharing by parents of responsibility for their children;[54]

This represents a concrete statement of equality with respect to the law's characterization of the equal importance of roles people play within their relationships.

Only married couples have a right to division of property under the FLA. Common law couples can make a claim against their partner's property, but this claim is not authorized by provincial statute. Rather, it is a constructive trust, which is permitted by the common law (law decided by judges in cases). All couples, however, have the option of entering into a domestic contract prior to marriage or co-habitation. Domestic contracts are discussed in more detail below.

Relationship breakdown

Not surprisingly, there is a spectrum of formality in the way couples approach their separation. The following sets out what typically may happen in the "mainstream" community. Many separating couples settle their affairs without the involvement of third parties. Some couples may have informal, unwritten or written agreements, while some may simply lose touch and never resolve any outstanding issues that might remain.

Still other couples reach an agreement with the help of a trusted advisor who may or may not be trained, such as a relative or a friend, a religious leader, or a counselor. Most couples receive some form of legal advice either from their lawyers, legal aid advice counsel, or employee legal service plans. The majority of these couples reach settlement without formal dispute resolution services, and in particular, without ever having to go to court.

When people do go to their lawyers, they may go already equipped with a plan for a separation agreement and simply might want legal advice to make the plan a legally enforceable agreement. In the event one or both people retain lawyers, the lawyers will negotiate between themselves, and in four way meetings with their clients, after an initial exchange of information.

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[54] *Family Law Act*, R.S.O. 1990, c.F.3, Preamble.

It is interesting to note that some lawyers in Ontario have established collaborative family law practices. Under collaborative family law, clients must agree that they will change lawyers if they decide to go to court if a negotiation does not end in a settlement. Ideally this approach is thought to focus the clients on reaching a negotiated solution, as opposed to focusing on intimidating or bullying the other person with threatened court action. Interestingly, lawyers who practice collaborative family law report greater satisfaction with their work.

Domestic Contracts

The agreements reached with the help of lawyers, collaborative or not, are formalized in a separation agreement. The separation agreement is made under the authority of Part IV of the FLA; it is a contract between the separating couple. The main formal requirements for an enforceable agreement are: that the agreement be in writing; that it be signed by the parties; that the signature be witnessed; that the best interests of the child be respected; and that the agreement be in accordance with child support guidelines.[55]

The FLA contemplates the various contractual arrangements people may enter into as a result of the breakdown of their relationship. The FLA sets the public policy parameters for resolution of family disputes through agreements. For instance, domestic contracts prevail over the provisions of the FLA, except as provided for in the FLA.[56] This reflects a policy decision to place greater value on the agreements to which people mutually consent, rather than on the provisions of the Act, where the two exist simultaneously. The corollary to this policy choice is that the FLA permits a provision in a domestic contract to be incorporated into a court order, if it deals with a matter that can be addressed under the FLA itself.[57] This recognizes that, if contracts are the main means of settlement, they may require recognition by a court to permit their enforcement, even though these contracts have been made without the court's assistance.

The FLA permits spouses to contract out of sharing any, or all, of their property by excluding property from the calculation of "net family property".[58] Spouses are also allowed to contract out of spousal support. However, the FLA allows the court to set aside a support agreement or a waiver of support in a domestic contract under certain conditions. These circumstances include: where it results in unconscionable circumstances; if the person entitled to support is in receipt of social assistance; or if the support provision is in default.[59]

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[55] *Family Law Act*, R.S.O. 1990 c.F.3, ss. 55(1), 56(1)-(1.1)
[56] *Family Law Act*, R.S.O. 1990 c.F.3, s. 2(10)
[57] *Family Law Act*, R.S.O. 1990 c.F.3, s. 2(9)
[58] The FLA defines one category of excluded property as "property that the spouses have agreed by domestic contract is not to be included in the spouse's net family property." *Family Law Act*, R.S.O. 1990 c.F.3, s. 4.
[59] *Family Law Act*, R.S.O. 1990 c.F.3, s. 33(4)

A domestic contract may be filed with the court for the purpose of enforcing a support provision.[60] This section applies even where a party has waived the right to file it with the court for the purpose of enforcing the support provision. This makes it effectively impossible to waive the right to file with the court for enforcement of a support provision.

Contracting out of protections relating to the possession, sale or mortgage of the matrimonial home through a marriage contract is prohibited under the FLA.[61] However, this does not prohibit contracting out of sharing the value of the home. Likewise, one cannot contract about the custody and access of children before the relationship has broken down.[62] Contracts made outside Ontario may be valid in Ontario if they would be valid if made under the law of Ontario.[63]

The FLA contains a basic policy statement setting some explicit limits on domestic contracts, which permit a court to set these contracts aside.[64] For instance, the court may disregard any provision that a couple makes about their children's upbringing where the court believes it is in a child's best interest to do so.[65] This threshold (best interests of the child) is a low threshold for court intervention. It simply may be a policy restatement of the court's inherent authority over children and their welfare, referred to as *parens patriae* jurisdiction.

Beyond this, the FLA permits the court to disregard a provision relating to child support where the provision is unreasonable with regard to the child support guidelines.[66] Again, this is a very low threshold that gives broad scope for court intervention.

Part IV of the FLA also influences the way parties and lawyers behave when negotiating domestic contracts because they are aware of the court's power to set these contracts aside in certain circumstances.[67] For instance, if a party to a domestic contract failed to disclose significant assets, or significant debts or other liabilities, existing when the domestic contract was made, the court may set the contract aside. Court decisions have expanded this obligation to include full and frank financial disclosure, including disclosure of income and income sources. The court may also set the contract aside if a party did not understand the nature and consequences of the agreement. Courts have generally interpreted this to mean that the parties must have received independent legal advice from a lawyer familiar with Ontario family law. The court may set aside domestic contracts for other reasons according to the law of contract, including lack of capacity to contract, lack of consent, duress or mistake.

The court may set aside all or part of a domestic contract or settlement if the court is satisfied that one spouse used the removal of religious barriers to remarriage as part of the bargain during the negotiation.[68] This provision applies to all religions. In fact, the court can set aside any settlement of a family matter if it was negotiated with reference to removal of religious barriers.[69] It is important to note that the court has this discretion regardless of the form the settlement takes. This section of the FLA refers to "consent orders, notices of discontinuance and abandonment and other written or oral arrangement".[70] In the case of settlements contracted with reference to religious barriers to remarriage, the court has the widest available scope for intervention in this type of situation. This policy choice of the broadest possible court power in the context of religious barriers to remarriage reflects an understanding that negotiating in the context of religious principles may be different than in a non-religious context.

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[60] *Family Law Act*, R.S.O. 1990 c.F.3, s. 35(1)
[61] *Family Law Act*, R.S.O. 1990 c.F.3, s. 52(2)
[62] *Family Law Act*, R.S.O. 1990 c.F.3, ss. 52(2)(c), 53(1)(c)
[63] *Family Law Act*, R.S.O. 1990 c.F.3, s. 58
[64] *Family Law Act*, R.S.O. 1990 c.F.3, s. 56
[65] *Family Law Act*, R.S.O. 1990 c.F.3, s. 56(1)
[66] *Family Law Act*, R.S.O. 1990 c.F.3, s. 56(1.1)
[67] *Family Law Act*, R.S.O. 1990 c.F.3, s. 56(4)

Arguably only this one section of Part IV (section 56(5)) currently applies to arbitral awards, since they would qualify as an "other written or oral arrangement".[71] Generally, Part IV apply only to domestic contracts which are specifically defined as marriage contracts, co-habitation agreements, separation agreements and paternity agreements.[72]

When negotiation between lawyers does not reach an agreement, or leave some issues outstanding, many family lawyers recommend mediation as an alternative to going directly to court. Increasingly, lawyers are also using arbitration as an alternative to resolving issues that have not been resolved by mediation. As we know, settlement of any legal dispute usually involves compromise. When negotiating, couples operate in the shadow of the law, but most often without in-depth understanding of what the law requires or permits.

We should not lose sight of the fact that people can give up their entitlement to claim any of the benefits of the *Family Law Act*. Often a separation agreement benefits one spouse more than the other for reasons of personal choice; such as guilt on the part of the leaving spouse, a wish to maintain the standard of living of children, or a desire to settle matters in an expeditious manner. There are many reasons why people forsake their entitlements in favour of arriving at a resolution of their dispute. All that the *Family Law Act* creates is an entitlement to make a claim. Some people do not want the conflict or expense of participating in the system, and so simply walk away. Like all civil law, individuals are responsible for bringing their own court action if they want to achieve a particular result. In this sense, the family law system in Ontario is a self-enforced system.

Recent decisions from the Supreme Court of Canada emphasize that people must abide by their personal choice. Even in situations of apparently unequal bargaining power, the court has ruled that personal choices must be followed. For example, in *Walsh*, a case that arrived at the Supreme Court from Nova Scotia, a woman who

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[68] *Family Law Act*, R.S.O. 1990 c.F.3, s. 56(5)
[69] *Family Law Act*, R.S.O. 1990 c.F.3, s. 56(6)
[70] *Family Law Act*, R.S.O. 1990, c.F.3, s. 56(6)
[71] *Family Law Act*, R.S.O. 1990 c.F.3, s. 56(5)
[72] *Family Law Act*, R.S.O. 1990 c.F.3, s. 51.

"chose" not to marry was not allowed to make a claim for property division.[73] In the case of *Miglin*, a woman who signed a waiver of spousal support, but accepted a time-limited position as a consultant in the family business instead, was held to her agreement.[74] Finally, a lawyer who signed a pre-nuptial agreement on the day of her wedding, after being told by a legal colleague that the agreement would not be upheld, was held to that agreement in *Hartshorne*.[75]

In all of these cases, the Supreme Court determined that the exercise of personal choice was made within the acceptable limits of contractual law, and that the people making those choices had to be responsible for them.

Polygamy

Another issue that falls under the rubric of family law is polygamy (being married to more than one person). In an effort to demonstrate that Islam as a religion is fundamentally unfair to women, many contributors mentioned that Islam allows polygamy. They asserted that Islam's tolerance for men having more than one wife is a clear indication that women are viewed as inferior in that religion. Some explanation about the status of polygamous marriage in Ontario and Canadian law may assist in understanding this concern.

Polygamy is an offence under the *Criminal Code of Canada*. Everyone who enters into "any form of polygamy" or any "conjugal union with more than one person at a time" is guilty of an offence.[76] There is also a separate offence for any person who "celebrates, assists or is a party to a rite" that sanctions a polygamous marriage.[77] Many participants mentioned that although polygamy and performing polygamous marriages are offences in the *Criminal Code*, police are reluctant to lay charges. The Review received anecdotal evidence from a number of sources that polygamous marriages are being performed in Ontario and concern was raised about the situation of women whose spouses marry more than once. In spite it being a *Criminal Code* offence, throughout Canada, it is possible to have more than one married spouse, as long as the marriages took place in a jurisdiction that recognized the ceremony. The FLA recognizes a marriage that is "actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognized it as valid".[78] People who are in such marriages can therefore claim a division of property from their married spouse.

Even people who have not married more than once can have two or more spouses according to Ontario law. This results from the definitions of spouse in many Ontario statutes. For example, s. 29 of the FLA defines spouse, for support purposes, to include three categories; persons who are married, persons who have resided together for three years, and persons who have a relationship of some permanence, if they are the parents of a child.

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[73] *N.S. (AG) v. Walsh* [2002] 4 S.C.R. 325.
[74] *Miglin v. Miglin* [2003] 1 S.C.R. 303.
[75] *Hartshorne v. Hartshorne* [2004] 1 S.C.R. 550.
[76] *Criminal Code*, R.S.C. 1985, c. C-46, s. 293(a).
[77] *Criminal Code*, R.S.C. 1985, c. C-46, s. 293(b).
[78] *Family law Act*, R.S.O. 1990 c. F3, s. 1(2)

Participants in the Review expressed concern that a woman could lose property, support, and inheritance rights if her husband chose to take a subsequent wife. However, in many instances, that is the result under Ontario law when a person takes a subsequent (common law) spouse. Consider the hypothetical case of Tim, who married Jane when he was 22, and separated from her at 24 when he went to live with Mika. He and Mika lived together for 4 years, during which time he had an affair with Laura. Laura became pregnant, and since the child's birth 8 months ago, he has been living with Laura and the child. If Tim and Jane have never divorced, Tim has three spouses for the purpose of spousal support obligations. Ironically, permitting polygamy would provide additional protection to Mika and Laura in this example, because they would also be able to claim a division of property, in addition to support rights.

The main difference between Ontario law and Islamic personal law in this instance appears to be that, under Ontario law, both men and women can have subsequent relationships, whereas under Islamic personal law only men have this option. This distinction may make sense in the context of Islamic personal law, under which only the husband has an obligation to support the wife while the wife does not have a corresponding obligation to support the husband.

Some Additional Information About Children

In Ontario, most laws relating to children are contained in two provincial statutes: the *Children's Law Reform Act* (CLRA) and the *Child and Family Services Act* (CFSA). The only exception is that child support provisions are located in the *Family Law Act*. As mentioned earlier, the federal *Divorce Act* can be used to determine custody, access and support of children whose parents are divorcing.

In Ontario the concept of illegitimacy (being born outside marriage) was abolished in 1978. This means that the definition of child in Ontario law includes children born both inside and outside of marriage. With respect to support, this means that support claims may be made on behalf of all children, regardless of whether they were born within or outside of marriage.

The most common way for parentage to be established is through the registration of the child's birth by the child's parents. However, a court also has the power to make an order declaring a person to be the parent of a child, even where that person or the other parent may not want to recognize their parentage.[79]

Parents must support their children whether they are born from a marriage, a common law relationship, or a casual encounter. Contractual arrangements that provide otherwise will always be subject to the court's inherent jurisdiction, which allows it to intervene in the best interests of the child. In the case of support, even stepparents (both married and common law) must support a child, where they have shown an intention to treat that child as part of their family.

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[79] *Children's Law Reform Act*, R.S.O. 1990, c.C.12, ss. 4, 5, 6.

In Ontario, any person can apply for custody of or access to a child. This approach contrasts with most other provinces, and the federal *Divorce Act*, where only people who are parents or have acted as parents may apply without court approval. Once again, the test that judges use when making decisions about children is the "best interests of the child". With slight variation, both custody and access and child welfare laws direct the judge to consider the child's best interests. As discussed in the case of domestic contracts, courts can make orders about children that differ from what their parents have agreed to if the court finds it is in the child's best interests.

Courts are prohibited from granting a divorce to married couples unless they are satisfied that reasonable arrangements have been made for the support of the children. When considering if arrangements are reasonable, the court must refer to the child support guidelines. The child support guidelines were developed co-operatively between the federal and provincial governments to ensure a predictable and consistent level of support for children.

Notwithstanding the flexibility the courts have with respect to the best interests of the child standard, parenting of children is an area of significant demand for public policy change. Non-custodial parents groups are concerned that the majority of children of separated couples live with their mothers, and only visit with their fathers. Advocates for women who have been abused submit that shared parenting, where all decisions and time are shared between the parents, might be used as a method of control by an abusive former spouse. They also express concern that reductions in child support, as a result of equal time sharing, could erode the standard of living of female-headed separated households.[80]

Section 46 of the CLRA incorporates the *Hague Convention on the Civil Aspects of International Child Abduction*, an international convention that provides for reciprocal assistance between countries when children are abducted across borders. It is important to note that this Convention only applies if both countries have signed and ratified the treaty. However, in Canada, sections 282 and 283 of the *Criminal Code* make it an offence to remove a child from his or her parent with the intention of depriving that parent of contact with the child.

The *Child and Family Services Act* (CFSA) is the provincial law that permits a Children's Aid Society to become involved if a child is being abused or neglected. Many participants in this review have raised concerns about child abuse. Violence against children is a criminal offence, and as such, falls under the category of matters that are not subject to arbitration.

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[80] Submission of Ontario Women's Justice Network (2004).

Under the CFSA, any person, whatever the source of their knowledge, has a mandatory duty to report to a Children's Aid Society if they suspect that a child is being neglected, abused, sexually exploited, or otherwise not cared for in a manner that meets minimum parenting standards.[81] This is a legal obligation that applies to everyone. Beyond this, if you are a person who works with children, it is an offence not to report suspicions about child abuse or neglect. Many people fall into the category of those who may be charged with an offence for failing to report. They include health care professionals, lawyers, and "a teacher, school principal, social worker, family counselor, priest, rabbi, [or] member of the clergy."[82] While these sections do not explicitly apply to mediators and arbitrators, it is likely that most people who practice ADR would fall within one of the explicitly established professions. They would be bound by the same duty to report in their function as mediators or arbitrators.

The law relative to physical discipline of children became somewhat clearer since the Supreme Court of Canada's decision in *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*.[83] In that case the court concluded that it is defensible only for parents to strike children who are between the ages of 2 and 12 as a form of correction, without an implement, and not on their head or face area. Teachers may use reasonable force to remove children from a classroom or to secure compliance with instructions, but may not strike children in their care.

Inheritance in Ontario

In Ontario, inheritance is divided into two areas: inheritance according to a will, or testate succession; and inheritance without a will, or intestate succession. A partial intestacy occurs where a will only covers part of the inheritance. The portion that is under a will is dealt with according to the will's instructions, and the portion that is not covered by the will is dealt with as an inheritance without a will, or intestacy. All successions, whether testate, intestate, or partially intestate, are subject to a claim under the FLA by the surviving spouse, where the net family property of the deceased spouse is greater than that of the surviving spouse.[84]

Simply put, if a person has a will, they may include or exclude anyone they wish, subject to the spouse's claim under the FLA or to the claims of dependants for support from the estate. Children born outside of marriage are included in the definition of dependants in the *Succession Law Reform Act*.[85] As such they are entitled to a priority claim on the estate for the purposes of support as dependants.

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[81] *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 72

[82] *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 72(5)(b)

[83] *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*, [2004] 1 S.C.R. 76.

[84] *Family Law Act*, R.S.O. 1990 c. F3, s. 5(2)

[85] *Succession Law Reform Act*, R.S.O. 1990, c.S.26, s. 57.

In addition, categories of persons are interpreted to include those people in the category, whether or not they are related by marriage.[86] So for example, if a will reads, "I leave my savings to my nieces and nephews in equal shares," this will include nieces and nephews born outside marriage and unacknowledged. However, the will may specifically exclude people born outside of marriage. Then the will would read, for instance, "I leave my savings to my nieces and nephews born inside marriage in equal shares".

All children inherit from their biological or adoptive parents, unless the parent has a will that provides otherwise. If the child is still eligible for support (i.e. is still a dependant), that child has a first claim on the parents' estate before it is distributed. Stepchildren may be dependants, and make a support claim, but they do not automatically inherit from their stepparent.

Concerns that have been expressed by some participants regarding the possibility of excluding particular individuals from an inheritance under Islamic personal law lose their poignancy in the context of Ontario's succession regime. Inheritance law in Ontario already allows people to exclude whomever they want from their will, so long as the will is valid and provisions have been made for the married spouse and any dependants. Alternatively, where no will exists different rules apply. Here, the law seeks to make equitable distribution of the inheritance since it has no instruction from the deceased. This applies equally to all intestate successions.

In a situation where a person dies without a will, the *Succession Law Reform Act* acts as a code for the distribution of the inheritance. Accordingly, the first person to be considered next of kin is the legally married spouse of the deceased.[87] If the only next of kin is the spouse then the spouse inherits everything. If there are other next of kin, the spouse is entitled to the "preferential share", which is the first $200,000 of the value of the estate.

If the value to be inherited is less than the preferential share ($200,000), the spouse of the deceased inherits everything, even if there are other next of kin.[88] The division of what remains above the preferential share takes place as follows. If there is one child, the child and the spouse divide equally the remainder of the inheritance.[89] Where there is more than one child, the spouse gets one third of the remainder of the inheritance, over and above the preferential share, and the children divide the rest between them.[90] In the event of a partial intestacy, if the spouse inherits something, this will be taken into account for the calculation of the preferential share.[91]

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[86] *Succession Law Reform Act*, R.S.O. 1990 c.S.26, s. 1(1), *Children's Law Reform Act*, R.S.O. 1990, c. C12, s. 1(1).
[87] *Succession Law Reform Act*, R.S.O. 1990, c. S26, s. 44.
[88] *Succession Law Reform Act*, R.S.O. 1990, c. S26, s. 45(1).
[89] *Succession Law Reform Act*, R.S.O. 1990, c. S26, s. 46(1).
[90] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 46(2)
[91] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 45(3)(a)

If there is no spouse and there are no children, then the inheritance goes to the parents of the deceased, in equal shares.[92] If there is no spouse, and there are no children or parents, then the inheritance goes to the deceased's siblings, or if they have died, the inheritance goes to the children of the siblings.[93] If there is no immediate family, the inheritance passes on to nieces and nephews in equal share per capita.[94] After that the inheritance passes on to the next level of next-of-kin in equal shares according to the table of consanguinity (relationships by blood).[95] Finally, if there is no one who stands to inherit from a deceased who does not have a will, the inheritance goes to the Crown.[96]

It is clear then, that under Ontario law, testate successions can be organized in any way, to the exclusion of anyone, provided that adequate provision is made for the married spouse and dependants. Therefore, if a will is drawn up according to the dictates of Islamic personal law, and it is a valid will under Ontario law, there is no reason to ignore it under Ontario law. Intestate successions are distributed according to the statutory provisions, provided the matter is brought to the court's attention. The law on intestacy establishes a regime of entitlements, but it does not prevent beneficiaries from making other, private arrangements. If beneficiaries want to arbitrate about an intestacy, they have a right to do so. In order for the courts to become involved , someone must bring a complaint, as is the case for any civil action.

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[92] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 47(3)
[93] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 47(4)
[94] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 47(5)
[95] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, ss. 47(6), 47(8)
[96] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 47(8)

Section 4: Summary of Consultations

Methodology

The consultation phase of the Review began in late June 2004 and continued through September 2004. Although the time frame was short and took place over the summer, the Review received numerous submissions. (See Appendix III) The staff of the Ministry of the Attorney General and the Ontario Women's Directorate provided contacts among their stakeholder groups and arranged meetings with those that indicated a desire to participate in the consultation. In addition, I was provided access to the correspondence and submissions that had been made prior to the initiation of the consultation, together with the responses provided by the Ministries. Once the consultations were underway, other groups contacted me and also asked to participate.

As the consultation proceeded, it became clear that there were a number of identifiable themes running through the discussion. Given the volume of the submissions and the repetition of similar concerns, I have decided to summarize the submissions thematically, quoting directly in some instances and paraphrasing in others. Where unique or particularly striking suggestions were made, these have been included with attribution. However, in many cases, the concerns cited and the solutions proposed were so general that specific attribution has not been made.

Theme: Arbitration Should Not Be Used to Determine Matters of Family Law

The Review heard from many strong opponents of the use of arbitration for family law disputes. Until the issue was made public through the declarations of the Islamic Institute of Civil Justice, many of these respondents had been unaware that arbitration was one of the alternate dispute resolution mechanisms available for family law disputes. Many had previously expressed concerns about the effect of mediation on vulnerable people; some view arbitration as even more problematic, given that it does not require supervision by the courts in order to be binding on the parties.

The most direct challenge was from the Muslim Canadian Congress, a national organization that "provides a voice to progressive Muslims who are not represented by existing organizations." Although particularly opposed to religiously-based arbitration, the Muslim Canadian Congress, through its legal representative, Rocco Galati, strongly challenged the legality of the use of the Arbitration Act for family matters at all:

> The Muslim Canadian Congress respectfully submits:
> 1. that the Arbitration Act does *not* cover family disputes being resolved within its parameters. Furthermore, that the Family Law Act and the other pieces of legislation covering family law jurisdiction are the sole, exclusive and comprehensive scheme for resolving all family law matters touching on relationships between spouses and their children, including estate and inheritances by

spouses and children. It is therefore our position that none of these matters can be dealt with under the Arbitration Act.

2. that if indeed the government takes the position, as it seems to be doing, that the Arbitration Act can deal with these matters, then the MCC further takes the position that, to that extent, the Arbitration Act is unconstitutional and of no force and effect in that:
    a. It breaches the rights contained in sections 2, 7, and 15 of the Canadian Charter of Rights and Freedoms as enunciated by the Supreme Court of Canada with respect to any differential treatment not specifically set out in the Constitution Act, 1867;
    b. Breaches the unwritten constitutional norms enunciated by the Supreme court of Canada in the Quebec Succession Reference, namely the rule of law, constitutionalism, federalism, and respect for minorities;
    c. Breaches even the common law rights to equality of citizenship as enunciated by the Supreme Court of Canada in *Winner*, and
    d. Is otherwise repugnant to public policy in the *de facto* privatization of the legislative function and duty of parliament, which in fact, has been declared as unconstitutional as being the abandonment and abdication of the legislative function of parliament, as enunciated by the Supreme Court of Canada in *Re Gray* and further endorsed by the Supreme Court in *Hallett* and *Carey*.
3. In light of the fact that this Act exists and the Government states that there is such statutory and constitutional jurisdiction, and in light of the fact that MCC completely rejects and disagrees, we demand, on behalf of not only Muslim-Canadians, but all other Canadians who defend the rule of law and constitutionalism and equality that the matter be referred on a reference to the Ontario Court of Appeal pursuant to Section 8 of the Courts of Justice Act to determine:
    a. Whether the Arbitration Act confers jurisdiction, outside the Family Law Act and other related family law statutes, to determine disputes of property, children, inheritance and estates in the family context.
    b. If the Arbitration Act does confer such jurisdiction, whether it is constitutional.[97]

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[97] Submission of the Muslim Canadian Congress (August 26, 2004).

The National Association of Women and the Law (NAWL), in conjunction with the Canadian Council of Muslim Women (CCMW) and the National Organization of Immigrant and Visible Minority Women of Canada, also challenged the constitutionality of using the *Arbitration Act* for family matters, citing Section 15 of the *Charter of Rights and Freedoms* and arguing that it is inherently discriminatory against women to allow the use of other forms of law, for example religious laws, as opposed to Canadian law, to determine family matters, stating:

> …it is necessary to step back and challenge the enabling legislation, the Arbitration Act… It is necessary because in order to invoke a Charter right, one must demonstrate some form of governmental action. The broad legal argument would be [that] the lack of limits in the Arbitration Act that permit family law matters to be arbitrated upon using any legal framework is discriminatory in its effect on women.
>
> The Arbitration Act does not make any direct distinction between individuals. It is a statute that is open to any adult person to use. The argument at this stage of the s. 15 test is that the Act, in not setting any express limits as to the type of civil law under its jurisdiction, disparately impacts women. Specifically, the Act permits the use of family arbitration. Women are negatively impacted because of the possibility that any framework may be used to decide family law issues, even frameworks that hold no recognized principles of equality or statutory criteria under the Family Law Act or the Divorce Act.[98]

The National Council of Women of Canada (NCWC) has adopted a lengthy resolution also opposing the use of arbitration for family matters, stating in part:

> That the National Council of Women of Canada (NCWC) adopt as policy:
> a) that the equality for women, embedded in the Canadian Charter of Rights and Freedoms and the convention on the elimination of all forms of Discrimination Against Women (CEDAW), be respected in Family Law;
> b) that binding arbitration be rejected for Family Law disputes; and
> c) that no alternative systems for resolving family law disputes be allowed to compromise the rights of women and children as they presently exist in Federal, provincial and territorial Law; and
> d) the need to find savings in court time and court costs should not compromise the rights of women and children.[99]

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[98] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).

[99] National Council of Women Of Canada *Protecting Family Law Resolution 04.01EI (2004), online:* <http://www.ncwc.ca/pdf/policies_2004.pdf>.

The NCWC resolution goes on to urge both the Government of Canada and the provinces to adopt the same policy position.

NAWL has expressed concerns for many years about the power imbalance between men and women, particularly where domestic violence is a factor, which makes alternative dispute resolution potentially prejudicial to the equality rights of women. The submission points out that these concerns are even greater when family matters are decided by arbitration.

> Arbitration is different from mediation in that the parties agree to have a third person adjudicate their dispute for them in a similar manner that a judge would. ...an arbitral award can be filed with a court and then enforced as a court order. Filing an arbitration order with a court is neither mandatory nor does it represent court oversight of an arbitral award. It merely means that a party to the arbitration agreement has recourse to enforcement should another party fail to abide by the arbitrator's decision. Once an arbitration agreement is signed, the parties do not have the option of withdrawing from arbitration. This can be particularly problematic where an agreement to arbitrate is signed at the date of the marriage, but the actual arbitration does not take place until years later, during which time a person may have changed her/his mind about wanting to submit a dispute to arbitration.[100]

Both NAWL and the Canadian Council of Muslim Women (CCMW) argue that Ontario ought to follow the lead of Quebec and prohibit family law issues from being settled by arbitration. The *Civil Code* states:

> Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.[101]

The CCMW submission urged that Ontario follow the same path as Quebec and remove the option of using the *Arbitration Act* with respect to family law matters at all.[102]

Interestingly, the Quebec Code of Civil Procedure calls for mandatory mediation in cases of family law, a policy that NAWL and most interested women's groups opposed in Ontario on the grounds that the power imbalance between men and women makes mediation not only unequal, but downright dangerous if family violence is a factor. Their position seemed to be that, even given this problem, at least the settlements arising out of mediation are supervised by the court and therefore subject to scrutiny.

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[100] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).

[101] Civil Code of Quebec Art. 2639 C.C.Q.

[102] Submission of the Canadian Council of Muslim Women (July 23, 2004).

It is clear that Rabinnical Courts or Beit Din do arbitrate in family matters in Quebec; however, it would appear that these arbitral awards may be treated as advisory, in a similar manner to separation agreements, and require confirmation from the court to be considered legally binding.

Many submissions referred to the "privatization" of family law matters as a negative trend in Ontario and Canada. Alternate dispute resolution mechanisms are seen as taking family matters out of the public sphere where they are subject to public policy imperatives and scrutiny. According to Gaetanne Pharand, President of Action ontarienne contre la violence faite aux femmes,

> Contrairement aux lois en vigueur qui pourraient faire l'objet de réformes ou modifications grâce à la jurisprudence, on ne pourrait avoir d'emprise sur les vicissitudes des décisions prises en arbitrage, puisque celles-ci font partie d'un processus privé. Les lois canadiennes n'étant pas toujours sans failles dans leur élaboration ou leur application, le public dispose au moins d'un recours puisqu'il s'agit d'un processus public. L'utilisation des processus alternatifs dans les cas de garde légale ou de séparation des biens matrimoniaux constituent une privatisation du droit de la famille qui remet en question les principes mêmes de justice.[103]

The NAWL submission further elaborates:

> It is possible to make a general argument about the impact that the privatization of family law is having on women. Indeed, many scholars have written about the dangers of the state washing its hands of responsibility in matters that are "private."
>
>> The ideology of the public/private dichotomy allows government to clean its hands of any *responsibility* for the state of the 'private' world and *depoliticizes* the disadvantages which inevitably spill over the alleged divide by affecting the position of the 'privately' disadvantaged in the 'public' world.[104]

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[103] Letter from Gaetanne Pharand to the Attorney General of Ontario (September 30, 2004) forwarded to the Review.
Translation: "Unlike legislation which is in force and may be subject to reform and variation on the basis of jurisprudence, there would be no control over the vagaries of decisions made under arbitration, since these are part of a private process. While the drafting and application of Canadian laws is not always flawless, at least the public has a means of recourse since the process is public. The use of alternative processes in the case of legal custody or separation of matrimonial assets constitutes a privatization of family law which calls into question the very principles of justice."

[104] Lacey, in Susan Boyd, ed. *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) at 3 quoted in submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).

Some lawyers who regularly act as arbitrators and support the continued use of arbitration for family law matters, nevertheless expressed some concerns. Alfred Mamo, a London lawyer, wrote,

> One big deficiency with the arbitration process is that it does not need to adhere to the traditional concept of open justice, which ensures a just result through transparency, public scrutiny and accountability. This lack of openness can easily lead to the vulnerable being drawn into a process that is not procedurally or substantively in keeping with the principles of fundamental justice. Given the private nature of the process, especially in cases where there is no appeal from the arbitrator's decision, the process and the substantive result are both immune from scrutiny.[105]

Another lawyer who does arbitrations regularly, A. Burke Doran, also had some reservations about the appropriateness of arbitration in some family law situations:

> The major limitations are that it is probably not appropriate if one or both of the parties are in bad faith or intent on delaying the matter or playing procedural games; there being an advantage to the formality and awe of the court room setting for those cases. Another disadvantage of arbitration is that a matter that requires several days of evidence tends to stumble along over several months because of the time commitments of the lawyers on other matters. A trial judge will start a procedure and continue until it is finished and the lawyers will simply have to drop everything to be there. Theoretically that could happen on an arbitration but an arbitrator is usually reluctant to come down hard on counsel and the parties. Similarly arbitrators are inclined to be overly patient when sometimes that is really not the best approach. It can prolong matters.[106]

Theme: Arbitration Should Continue to Be Allowed in Family Law

The government's position is that arbitration of family law matters is permitted under the *Arbitration Act*, as are all other matters not prohibited by jurisdiction (such as federal jurisdiction over criminal offences or civil divorce) or statute (such as Ontario labour legislation.) Certainly, when the *Arbitration Act* changes were made in the early 1990's, there was a clear understanding that the use of alternative dispute resolution mechanisms, like mediation and arbitration, were being encouraged to promote greater choice and access to justice for those engaged in family law cases and to offer some relief for court backlogs that were causing family cases to drag on over time, thus exacerbating the conflicts. Because the arbitration process was private, and indeed was chosen by many because it kept their personal disputes out of the public limelight, no mechanism was set up to monitor or track the use of arbitrations for these issues. Therefore, the Review was faced with considerable difficulty in determining the extent to which arbitration is used for resolving family law disputes. We had to rely on the reports of lawyers and arbitration practitioners who volunteered to share information with us.

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[105] Submission of Alfred Mamo (September 16, 2004).

[106] Submission of A. Burke Doran (September 22, 2004).

From our consultations, it was clear that arbitration is more common in some court regions than others and most prevalent in Toronto, where heavy court schedules make arbitration an attractive alternative for the timely settlement of issues. However, we also found that arbitration is used across the province in family law cases. It appears that the availability of arbitrators viewed as experts is the most common characteristic determining the level of use, followed closely by the acceptance of alternate dispute resolution by the local legal community.

Of the lawyers we spoke to, those practising family law reported varying levels of trust and reliance on alternate dispute resolution mechanisms of any kind. Some lawyers, particularly those representing vulnerable clients, continue to be sceptical about mediation and the tendency of some non-legally trained mediators to encourage clients to sign mediation agreements without independent legal advice. Some family lawyers are so enthusiastic about ADR that they have entered into the practice of collaborative law, working closely with their client and the opposing lawyer and his/her client to try to reach resolutions without recourse to the courts. Still others encourage the use of mediation with the proviso that the matters that cannot be resolved will go to arbitration, sometimes with the same person acting as the arbitrator, if the arbitration agreement so provides. A number of leading family lawyers themselves provide mediation and arbitration services.

The Review also consulted with a number of different individuals and groups that are currently offering mediation and arbitration services and who strongly support retaining the capacity to arbitrate family law matters. Of those willing to share statistics with the Review, the numbers of arbitrations conducted by each in a year ranged from a high of 60 cases to a low of six cases, with the average being between 30 and 35. We do know that very few arbitrated settlements end up before the courts. Only one respondent reported that any of his decisions had been ever been judicially reviewed; in two cases, the allegation was that he had erred in law and in both cases, the request for review was denied by the court. A search of relevant case law corroborates the reports of these arbitrators and lawyers that these decisions, even when one of the parties to them does not "win," seem to be accepted by both parties in most cases. Even the enforcement of decisions through the courts seems to be less necessary than in court-based decisions. Those we spoke with suggested that this likely results from the clients feeling as if they have some control over the process, some say in who will judge the case, and some "buy in" to the results.

There are a number of reasons why arbitration has become a frequent, if not a preferred, route for a number of lawyers. Alfred Mamo spoke for a number of other respondents when stating:

> Generally, I believe that the growth in the amount of arbitrations conducted in family law matters is a direct result of the deficiency of the

> public justice system to meet the needs of the consumers. This is the case whether a jurisdiction has a "unified" family court or not. The government's and the bar's vision with respect to a holistic unified court with dedicated judges implementing a strong case management system for the benefit of the families involved has been and continues to be diluted.
>
> My concern is that we are seeing the creation of a two tier justice system: those who can afford, in essence, to choose and to hire their own judge to decide their case, create their own private court. Others "languish" in the public system. This phenomenon is made worse by the fact that self represented litigants are on the rise; that slows down all of the cases and gives lawyers and litigants more reason to opt out of the system.[107]

In one consultation, with representatives of the Family Law Section of the Ontario Bar Association and the Advocates Society, the Review was told that removing the option to arbitrate "would be a disaster, pushing the development of family law back thirty years." During the consultation with the Law Society of Upper Canada, one lawyer made the point that, with arbitration, the parties, with the advice of their lawyers, can choose an arbitrator who is an expert in family law, whereas in court, you get the judge who is assigned, whether or not he or she has expertise in family law matters. This perspective was echoed by prominent family lawyer, Philip Epstein, who also acts as a mediator and arbitrator:

> There are very significant benefits to the parties in this process. First and foremost, I think, the clients believe that they are getting expertise which is not always available in the courts. That is, judges move in and out of family divisions and they are not always experts. By choosing a family law expert and one that is constantly teaching, they get the most current views of the law and the most up-to-date approach to the resolution of problems. Because I am also a practitioner and I am in the business of working out settlements, they get the benefit of creative solutions to solve the problems. These kinds of creative solutions could not be fashioned by a court.
>
> Parties like the idea that the case starts and proceeds at a specific time on a specific date. There is no risk that the court will lose the file and, there is every expectation that the matter will proceed and finish in one day, which is usually the case. Lawyers are able to make appropriate appointments and not waste time waiting outside courtrooms and clients get a settlement within very specific time limits. Although the cost of mediation can be significant, it is virtually always shared and usually dramatically less than the costs of a court dispute.[108]

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[107] Submission of Alfred Mamo (September 16, 2004).

[108] Submission of Philip Epstein (September 21, 2004).

The Advocate's Society representative stated that the costs of arbitration are less than proceeding through the courts "100% of the time," lamenting that, by the time the more adversarial process in the court is finished, many clients have diminished the family resources to the point where there are few assets left to be divided. Not surprisingly, all the lawyers consulted recommend that independent legal advice be a requirement in order for family law matters to be arbitrated, although all recognized that the lack of availability of legal aid may prevent some clients who would benefit from arbitration from participating in it. All the lawyer respondents stressed the importance of a written, signed and witnessed arbitration agreement, made at the time of the dispute and laying out the issues to be arbitrated, any waiver of rights, and clarifying whether the arbitrator can also act as a mediator, where appropriate. All the lawyer arbitrators consulted and many of the non-lawyers as well, issue written decisions with reasons within a timeframe outlined in the arbitration agreement.

The Review received a submission from Fathers Are Capable Too (FACT), a self-described equality-seeking support and advocacy group to assist people dealing with divorce and to promote positive child and family outcomes when relationships start to fall apart. This group advocates for an expansion of mediation and arbitration in family matters as a means to reduce the discontinuity and stress that occurs upon marriage breakdown. The submission states:

> Courts and lawyers do not provide non-adversarial venues—they generate stress and adversity. Those cases [that] have gone before the courts, because of a system that encourages or requires courts, are dealt with overwhelmingly in motion courts. In motions court, decisions are imposed on the children after hearing a few minutes of non-expert and non-parental argument by a judge who will turn the decision around in less than 20 minutes—that these decisions will hold for decades. These family courts have become an abusive environment for children and parents. Motion courts do not, and often cannot, consider individual circumstances or individual children's needs in the vast majority of cases. Poor legislation, regulation, rules and bad previous judgements stop effective solutions from being found in a courtroom.[109]

The submission goes on to indicate that the current court system, does not include families in creating the solutions; instead, "it is the lawyers, judges, bureaucratic departments and 'experts' who seek to impose their own cultural norms on the diverse selection of families in Canada."[110] As a result, the submission urges an expansion of alternate dispute mechanisms.

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[109] Submission of Fathers Are Capable Too, ' Parenting Association, The Arbitration Act and Family Law' (September 3, 2004).

[111] Submission of Fathers Are Capable Too, 'Parenting Association, The Arbitration Act and Family Law (September 3, 2004).

> To this end, it is clear that alternate forms of dispute resolution that do not involve the courts are very important and need to be recognized as not victimising children or parents. Dispute resolution mechanisms that provide a healing element of community care and support, become even more important to children and parents to minimise the damage caused simply by the divorce.[111]

FACT opposes any requirement for independent legal advice, claiming that having lawyers involved in the alternate dispute resolution mechanism obviates the benefits of arbitration. The group also would like to see the grounds for court review substantially reduced; in particular, it advocates no court review pursuant to Section 56 of the Family Law Act:

> Section 56 of the Family Law Act allows the courts to come in and alter the income portions of the arbitration agreement, as well as adjusting custody, residency and access. Section 56 does not allow the recomputation of the division of property as agreed upon under the arbitration… An unbalanced rejection of the terms of arbitration causes injustice, an encouragement for opportunism and really makes it impossible to deal in a non-adversarial environment.[112]

FACT believes that the interaction between the *Arbitration Act* and the *Family Law Act*

> …must be aligned properly. The end result is that either family law matters should be removed from the Arbitration Act, thereby closing another reasonable choice for superior results for children and families, and forcing every family through the bilious quagmire called the family court system at great financial expense and social damage. Alternatively a positive acceptance of arbitration should be accepted, and made not easily overturned, to provide children and parents with community-based solutions that provide much better outcomes.[113]

To sum up the point of view of those who support the use of arbitration for family matters, I quote again from the submission of Phil Epstein:

> It would be a significant error, in my view, to prohibit parties from going to arbitration in Ontario to settle family law disputes. It is becoming far more common for parties to resolve their disputes in this way and, coupled with mediation, is an extremely useful tool for reducing conflict and encouraging earlier and less costly settlement. It would be a huge disservice to the public to take away this tool. I say this out of no self-interest factor, since parties will always continue to mediate and I have far more work in that area than I could ever want. I make this point because I think that arbitration is an extremely

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[112] Submission of Fathers Are Capable Too, 'Parenting Association, The Arbitration Act and Family Law (September 3, 2004).

[113] Submission of Fathers Are Capable Too, 'Parenting Association, The Arbitration Act and Family Law (September 3, 2004).

> effective tool and there is a huge cost benefit to the parties. The courts will always be available for those that do not wish to use this process but, arbitration will become more and more popular as parties learn more about it. There is also a significant advantage in arbitration in that it is a confidential process as opposed to the courts and many parties want their problems resolved in a confidential fashion.[114]

Theme: Arbitration should not be based on religious laws, particularly Islamic Personal Law

Religious people who feel bound by their faith to follow its teachings often find themselves in a dilemma when the civil laws of a country do not reflect the principles and practice of their religious beliefs. Religious law serves to determine who is considered a full member of the religious community. Those who do not conform to religious law may find themselves ostracized, disentitled to practice their religion within the community or entirely disowned by the community. Different religious communities have developed mechanisms to decide such matters and the consequences of not complying with the religious laws varies substantially. In most religious traditions, the religious laws that affect their lives the most are those that cover matters such as marriage, divorce, property division, support on marriage breakdown, custody and access of children, and inheritance, which we tend to call family law or personal law. A brief survey of some religious laws may be helpful to the discussion.

The Roman Catholic Church does not recognize divorce, considering marriage a sacrament that requires a lifelong commitment. For many years the Catholic Church used its considerable political power to oppose the liberalization of the divorce laws in Canada and around the world. A Catholic person who does divorce according to civil laws and then wishes to remarry and remain within the church, can only do so if he or she is granted an annulment pursuant to canon law. Once a civil divorce has been obtained, the party seeking the annulment applies to a marriage tribunal, whose function is to annul marriages according to canon law. Catholic marriage tribunals do not deal with custody, access, support or property division issues; these must be resolved by civil process, as the church law does not confer any jurisdiction on the tribunals to deal with these matters. If a Catholic person remarries without obtaining an annulment, the marriage is considered null and void by the Church and the person is refused communion. The status of any children of the marriage may be affected, particularly if the parents wish their children to be educated in the Catholic school system or to marry within the church. "Decisions of the Catholic marriage tribunal have never been the subject of litigation in secular courts and the participants do not avail themselves of the provisions under arbitration legislation."[115]

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[114] Submission of Philip Epstein (September 21, 2004).

[115] Submission of John Syrtash, 'Alternative Cultural Dispute Resolution,' [unpublished, archived with author] (August, 31, 2004) at 6-7.

In the Anglican Church of Canada, a divorced person who wishes to remarry within the church must apply to the bishop in his or her local diocese. The bishop may refer the request for advice from a "matrimonial commission" that meets in each diocese. In some instances, the matrimonial commission may consider the applicant's conduct toward the former spouse and any children of the former marriage, including the consistency with which child support has been provided, before giving advice to the bishop. The implication of this is that the church regards the ability of the person to carry through with obligations in making its decision as to whether or not remarriage in the church is appropriate. If it is not considered appropriate, the person would have to marry either civilly or in another church that does not apply such restrictions. In the Anglican example, the church does not annul marriages or deal with any of the property, support or custody issues that attend marriage breakdown; these are handled by the courts. Again, it appears that the Anglican Church, like the Catholic Church, does not make decisions pursuant to the *Arbitration Act.*[116]

Jewish law, *halakhah,* provides a comprehensive system of rules that apply with respect to marriage and the breakdown of marriage.

> Divorce in Judaic tradition is a simple matter. If a marriage fails, for whatever reason, then the means exists for an end to that contractual relationship. Based on repeated biblical references, the sages developed a system of liberation to release both partners. The purpose of the divorce is to enable both mates to seek new partnerships. Jewish divorce is the regrettable but acceptable solution to an unsuccessful marriage. …If a marriage does not "work", does not fulfill the expectations of the couple nor the ideals of Judaism, then the system sets forth an escape clause. Divorce is a lamentable necessity, no blame or sin is ascribed to the procedure. Divorce allows one the freedom to try again.[117]

In the Jewish faith, both parties must voluntarily agree to the divorce; the man is responsible to give the *get*, as both the document and the process is called, and the woman receives the *get*. The process is not intended to be adversarial in nature. When Jews marry, they sign a contract, called a *ketubah,* which provides for payment of support to women who are divorced or widowed. When *a get* is given and received, the *ketubah* is revoked. If a woman does not receive a *get*, she becomes an *agunah* and she is not free to marry in a religious Jewish ceremony. If she does insist on remarrying without the *get*, then any children from that new relationship will be considered illegitimate *(mamzerim)*: they will not be allowed to participate in religious ceremonies, to marry a Jewish person, or to enjoy full citizenship in Israel.

> A Jewish divorce is issued in a Jewish court, which is called a Beth Din. The Beth Din usually consists of three rabbis, one of whom is a specialist in the laws

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[116] Submission of John Syrtash, 'Alternative Cultural Dispute Resolution,' [unpublished, archived with author] (August, 31, 2004) at 7.

[117] Norma Baumel Jospeh, Evelyn Beker Brook, Marilyn Bicher, 'Untying the Bonds' Jewish Divorce: A GET Education Video and Guidebook' (The Coalition of Jewish Women for the Get, 1997) at 5.

> of divorce. **A civil divorce is not sufficient in Jewish law.** The legal requirement for a GET affects Orthodox and Conservative Jews. The Reform movement has determined that a civil divorce is usually adequate. However, the GET requirement is operative throughout the State of Israel. Parties without a GET would usually be unable to remarry in Israel. Thus many Jews are affected either directly or indirectly by these laws.[118]

John Syrtash quotes a study done by Toronto lawyer, Harvey J. Kirsh:

> In his study, Kirsh also demonstrates that "there is no central religious authority in Judaism", no ecclesiastical dignitary who exercises worldwide jurisdiction: "For the most part, each local congregation is independent of the others. But what binds the great majority of congregations together and provides an element of uniformity is the accepted authority of traditional law. The three main sources of Jewish law are the *Torah,* the *Mishna,* and the *Gemara*. The Talmud is essentially a compilation of laws and traditions which have evolved from the *Torah*. The laws of the *Torah* were enunciatory in nature and required a great deal of interpretation by the Rabbis."[119]

In Ontario, the Jewish court is known as the Beis Din. In the vast majority of cases, in the Orthodox, Conservative and Reform traditions of Judaism, parties approach the Beis Din only to give and receive a *get.* However, in about thirty cases a year, the Beis Din deals with all issues of marriage breakdown, such as support, property division, custody and access. In these situations, the Beis Din relies on enforcement through the *Arbitration Act.*

Since the proposal of the Islamic Institute for Civil Justice was impetus for the review, and because it was clear from many of the responses to the Review that the general public knows less about Muslim religious laws than about Jewish or Christian religious laws, I am going to try to provide a bit more information about Muslim religious laws than I did for the other forms. Jews, Christians and Muslims are all rooted in the Abrahamic tradition and rely on their holy texts to provide guidance for the faithful on earth to know how to meet the expectations of a single, all-powerful God. Muslims recognize Abraham, Moses and Jesus as Prophets of the One God.

For Muslims, the Quran is the revealed word of Allah to his last prophet, Muhammad, and lays out the legal, spiritual and theological requirements of Allah. The Quran is supplemented by the Prophet's *sunnah,* the judgements, attitudes and sayings of Muhammad, which were recorded at the time or shortly after the Prophet's death by his close followers, and by the traditions derived from these, called the *hadith*.

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[118] Norma Baumel Jospeh, Evelyn Beker Brook, Marilyn Bicher, 'Untying the Bonds' Jewish Divorce: A GET Education Video and Guidebook' (The Coalition of Jewish Women for the Get, 1997) at 4.

[119] Harvey Kirsch, ' Conflict Resolution and the Legal Culture: A Study of the Rabbinical Court' (1971) 9 Osgoode Hall L.J. 335 at 340 quoted in submission of John Syrtash, 'Alternative Cultural Dispute Resolution,' [unpublished, archived with author] (August, 31, 2004) at 8-9.

> With the death of Muhammad's Companions, as well as the suspect multiplication of oral traditions, the need of systematization of the *hadith* made itself apparent. Unfortunately, people had fabricated and perpetuated oral reports to suit their needs, and before long, by the beginning of the ninth century, a million *hadith*, often contradictory in nature, were being circulated. The complicated sciences of the *hadith* and of law, or *usul al-fiqh,* grew out of the need to utilize them in guiding guidance in a new social and political context. …These sciences evolved slowly but reached their fruition with the compilation of the six canonical books of *hadith* of the *Sunni* rite, and the four canonical books a century later of the *Shi'ia* rite, that is by the mid-tenth and eleventh century. …Traditionally, the authority of these canonical works, although man-made, has been little questioned. But since the eighteenth century, their authority has been re-examined as a result of successive Muslim reform movements and the challenges of modernity that have faced the Muslim world… [120]

The Canadian Council of Muslim Women provided the Review with an impressive resource, a study produced by the group Women Living Under Muslim Laws (WLUML), entitled "Knowing Our Rights: women, family, laws and customs in the Muslim World." Founded in 1984, the WLUML began as an action committee "in response to several specific cases that urgently required attention. In each of these cases, women were being denied rights by those who claimed to be acting in the name of Islam or with reference to 'Islamic' laws." [121] This group undertook a ten-year study of the way in which Muslim law applies to women in various countries across the world. It is clear from the exhaustive comparisons provided, that the same verses of the Quran appear to bring very different results, depending upon the history of the law in the particular jurisdiction.

> Today, most statute laws and even uncodified Muslim Laws applied by courts as 'muslim laws' are derived from an eclectic mixture of provisions from the various Schools. These are added to an acceptance of the principles of modernization (particularly reflected in the need for state regulation of marriage and divorce) and to remnants of customary practices (for example, the refusal of courts in many systems to recognize women's property rights on divorce.) In the W & L research, we also found that frequently judges and communities stated that their application of Muslim laws reflected a particular sect (e.g., Maliki or Hanafi laws), even though people of the same sect elsewhere do things differently.[122]

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[120] V. A. Behiery, A.M. Guenther, *Islam: Its Roots and Wings,* (Mississauga: Canadian Council of Muslim Women, 2000) at 11-13.

[121] Women Living Under Muslim Laws, *Knowing Our Rights: Women, family, laws and customs in the Muslim World,* (London: Women Living Under Muslim Laws, 2003) at 15.

[122] Women Living Under Muslim Laws, *Knowing Our Rights: Women, family, laws and customs in the Muslim World,* (London: Women Living Under Muslim Laws, 2003) at 30.

Obviously this issue struck a chord with many respondents, a sample of comments illustrate that the difficulty of defining exactly what we mean when we talk about the application of Muslim law is a major concern:

> Composition of Canadian Muslim community is very diverse. This diversity is further stretched in to the practices based on Schools of thoughts and certain cultural conventions, codified in some of the Muslim countries and regions.
>
> This could create controversies and problems in applying such varied law/standards/principles with the multi-ethnic, multinational, diverse population in Ontario.[123]
>
> There is no such thing as a monolithic "Muslim Family/Personal Law" which is just an euphemistically racist way of saying we will apply the equivalent to "Christian Law" or "Asian Law" or "African Law."[124]
>
> The history and evolution of Islam, thus, witnessed the growth of different communities of interpretation with their respective schools of jurisprudence. However, whatever the differences between the Shia and the Sunni or among their sub-divisions, they never amounted to such a fundamental a divergence over theology or dogma as to result into separate religions. On the other hand, in the absence of an established church in Islam, and an institutionalized method of pronouncing on dogma, a proper reading of history reveals the inappropriateness of referring to the Shia-Sunni divide, or to interpretational differences within each branch, in the form of an orthodoxy-heterodoxy dichotomy, or of applying the term "sect" to any Shia or Sunni community.[125]
>
> First and foremost there will never be a single, centralized Shariah Tribunal that all Muslims will accept. The differences of opinion within Islam would see to that very quickly. But Islam does not even call for unity of opinion in every single thing and actually, diversity of legal thought is regarded as a "mercy from your Lord." So, Muslims have always had such diverse examples of Shariah, which again shows the flexibility of Islam being able to entertain inclinations of all types. Thus far, we have been using the term, "Shariah Tribunal" as if there is a set model. There is none. Nothing to this effect has been discussed in the Muslim community because there is no central diocese of Islam to legislate such a thing. While most Masjids [mosques] operate in total independence from others, the only unity they possess is on basic beliefs. [126]

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[123] Submission of Islamic Council of Imams—Canada, 'Islamic Arbitration Tribunals and Ontario Justice System' (July 23, 2004).

[124] Submission of the Muslim Canadian Congress (August 26, 2004).

[125] Submission of His Highness Prince Aga Khan Shi Imami Ismaili National Conciliation and Arbitration Board for Canada (September 10, 2004).

[126] Submission of Mubin Shaikh, 'Shariah Tribunals and Msjid El Noor: A Canadian Model' (August 24, 2004).

The submission from Dr. Marvin F. Zayed, who is affiliated with the Humanist Association of Canada, explains how the differences in interpretation affect the modern practice of Islamic religious principles in this post-9/11 era:

> Islamic cultures are founded on the Koran and the Hadith (the sayings of Mohammad), as written in the original Arabic. Both the Koran and the Hadith contain many internal contradictions. In the context of modern bloodshed, these are reflected by contradictory Fatwas (religious decree) for or against suicide bombers. The first female suicide bombers presented a problem for Sunni Muslims, as the Hadith forbids killing women in warfare (but taking them as "imah" or slaves is quite acceptable). The al Azhar mosque in Cairo and the European Islamic Council came out with a new Fatwa legalizing these female bombers.[127]

It quickly became clear to me that many of the submissions differed substantially in how they interpreted the notion of Shariah and that these differing interpretations informed the responses in a very real way.

Shariah is based on both the *Quran* and the *sunnah*. As explained to me by many of the Islamic respondents to the review, *shariah* means "the way", or more literally, "the path leading to water." It is the journey of each person who is seeking to accomplish the will of Allah.

> The *shariah*, being a way of life, encompasses general codes of behaviour, the moral categories of human actions, the rules of rituals, as well as all civil, commercial, international and penal law. ...[The] principles inherent in the Q*ur'an* were regarded as eternal, while the reasoning and prescriptions (*fiqh*) stemming from them were not, because the legal system is manmade. [128]

Most submissions to the Review were adamant that the term Sharia should not be used to describe the proposed use of the *Arbitration Act* to deal with matters of family law for Muslims. The submission from the Council on American-Islamic Relations Canada (CAIR-CAN) represents these views clearly:

> The term sharia refers to a religious code for living covering all aspects of a Muslim's life from prayers, to financial dealings, to family relations, to caring for the poor. It is a comprehensive term that encompasses the private and the public, the individual and the community.
>
> It is inappropriate and misleading to use the word "shariah" to describe an arbitration tribunal that will use Islamic legal principles to resolve a very specific

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[127] Submission of Dr. Marvin F. Zayed, 'Critique of the Islamic Sharia' Arbitration Proposal in Canada' (March 2004).

[128] V. A. Behiery, A.M. Guenther, *Islam: Its Roots and Wings,* (Mississauga: Canadian Council of Muslim Women, 2000) at 14.

> and limited set of civil disputes which may be the subject of arbitration under Ontario's Arbitration Act. Moreover, such a tribunal is not a full-fledged Islamic court, as may be inferred by the use of the word "shariah," and its limited jurisdiction stems from the Act. The tribunal will, more appropriately, be a form of Muslim dispute resolution, consistent with Canadian law and the Charter within the flexibility of Islamic normative principles.[129]

The Islamic Council of Imams—Canada urged:

> These Tribunals should not be allowed to use the word Shariah Court. It remains an ADR Tribunal within the context of Ontario law. Only difference is that the environment is Islamic, i.e. members are all Muslims and the resolution is in the spirit of Islam and the Ontario laws.[130]

The CCMW are concerned that those who are seen to question Sharia may be accused of apostasy or blasphemy. Certainly, this fear is not a paranoid fantasy, given the statements of Aly Hindy, a "self-described fundamentalist" Imam, who told Sally Armstrong in a recent *Chatelaine* article,

> If a person says, "I don't believe in Sharia," he or she is not a Muslim. To go to hell is easy. To go to paradise takes work. Many people who call themselves Muslim are going to hellfire.[131]

Given this sort of pronouncement, the position of groups like the CCMW in refusing to use the term "Sharia" with respect to Muslim faith-based arbitration becomes easier to understand:

> Some Muslims, by using the term Sharia, immediately cause believing Muslims to hesitate in expressing any opposition, as no Muslim wants to be against the Sharia. However, the correct use of the term "Muslim" law opens up the discussion and one can then explore the issues within.[132]

Most respondents, whether against or in favour of allowing religiously based arbitration of personal matters, asked that the term Islamic personal law or Muslim personal law be adopted by the Review to describe the issue accurately. A notable exception was the Muslim Canadian Congress, which maintains,

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[129] Submission of Canadian Council on American-Islamic Relations (CAIR—CAN) (August 10, 2004).

[130] Submission of Islamic Council of Imams—Canada, 'Islamic Arbitration Tribunals and Ontario Justice System' (July 23, 2004).

[131] Sally Armstrong, 'Criminal Justice' *Chatelaine* (November 2004) 152 at 158.

[132] Submission of the Canadian Council of Muslim Women (July 23, 2004).

> In practical and realistic terms, what began as a demand to introduce "Sharia Law" has now dishonestly mutated into the same thorn by any other name and is still offensively unacceptable…[133]

Most of those who urged the Review to recommend against the use of religious principles for arbitrating family law are firmly of the belief that Canadian and Ontario family law is entirely secular in nature. For many, particularly those who have not lived through the major changes to Canadian law which occurred over the past forty years, there is little memory of the extent to which religious principles have informed the laws which we tend now to regard as secular in this country.

It is true that much of the struggle to ensure our laws embody equity principles has been viewed as a struggle to attain secularism over religiously based laws. However, for many individuals who come to this country from other lands, Western laws, rather than appearing to be secular, look patently "Christian" in nature, enshrining as they do such "Christian" values as monogamy in marriage or restrictions around divorce, not to mention official holidays and the defined work week. We should not be surprised when people, who are used to having the personal laws set out by their religion honoured in their country of origin, seek the capacity to apply those personal laws in their new land. We should also expect that, where people have come to Canada to escape the restrictions of such personal laws, they will vigorously oppose any possible re-introduction of those laws into their lives in Canada.

Many of those making submissions to the Review spoke from deep and personal experience with religious laws in other countries, particularly those countries where a comprehensive form of Shariah law prevails. The International Campaign Against Shariah Court in Canada is a coalition of groups and individuals drawn together by Homa Arjomand following the announcement of the Islamic Institute for Civil Justice; its purpose is to fight within Canada and internationally to prevent the use of Shariah law. Many of the active members of the group themselves have escaped from countries ruled by Shariah law; many came to Canada from Iran and Afghanistan. Many of them had been active in their home countries fighting for human rights and equality rights for women; as a result some had been imprisoned and tortured for opposing Shariah. The Campaign submitted a petition with more than two thousand names and conducted an effective letter writing lobby against allowing Shariah law to be used in any way within Canada. In a letter to the Review, Homa Arjomand states in part:

> We wish to state our opposition to the recent move for establishing an "Islamic Institute of Civil Justice in Canada." This move should be opposed by everyone who believes in women's civil and individual rights, in freedom of expression and in freedom of religion and belief. We also wish to emphasize that even the mere suggestion of the Shariah tribunals causes an atmosphere of fear among women who came from "Islamic" countries. If this Institute gains validity, it will increase intimidation and threats against innumerable women and it will open the way for future

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[133] Submission of the Muslim Canadian Congress (August 26, 2004).

> suppression. …It is a sad and painful fact that, even in Canada, we still have to talk about the religious oppression of women. Nonetheless, the reality is that millions of women are suffering and being oppressed under Shariah law in many parts of the world. Some of us managed to flee to a safe country, a country like Canada with no secular backlash.[134]

Thirty-five members of the Coalition made presentations to the Review, outlining their own personal experiences under Sharia law in Iran, Saudi Arabia, Pakistan, Kuwait and Iraq. I am grateful for the courage and determination of these women and men in sharing very painful stories to illustrate the oppressiveness of Sharia law where it governs every aspect of people's lives. For most of these respondents, the only way to prevent religious law from destroying people's lives is to refuse to allow its use for any purpose in Canada. Again, quoting from Homa Arjomand's submission,

> We need a secular state and secular society that respects human rights and that is founded on the principle that power belongs to the people and not a God. It is crucial to oppose the Shariah law and to subordinate Islam to secularism and secular states. …One must bear in mind that Shariah is not only a religion; it is intrinsically connected with the state. It controls every aspect of an individual's life from very personal matters such as women's periods to the very public ones such as how to run the state. It has rules for everything. An individual has no choice but to accept the rule of Shariah or face extreme consequences, as non believers are shown no tolerance. …We, the defenders of secularism, believe that the introduction of a Shariah tribunal or a "Shariah court" in Canada would discriminate against the most vulnerable sectors of society: women and children. It would deny them the Canadian values of equality and gender equity.[135]

The Humanist Association of Canada strongly backed the Coalition's view that there should be no religious alternative to the secular laws that govern family law and inheritance matters in Canada, and several correspondents made similar arguments to those of the Coalition. The Review also received many letters from unaffiliated individual Canadians urging that the influence of religious law be reduced rather than enhanced by being allowed under the *Arbitration Act*. One such communication provides a good example of the sorts of concerns being raised:

> Rather than increase the number of religious codes being allowed to operate within Canada's judicial system, please give serious consideration to reducing the control of these religious and community organizations and tribunals. A society divided by law, will further divide, such that the perceived differences of race, religion and gender will also grow. In an attempt to recapture the equality across the board for all Canadians, I

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[134] Submission of Homa Arjomand (July 21, 2004).

[135] Submission of Homa Arjomand (July 21, 2004).

> appeal to you not to pass the proposal to allow an increase in religious-based family law, but to establish a proposal to investigate the means to reduce such existing laws and eventually to remove the existing Act.[136]

The Review submissions indicate that the major objection to the use of religiously based arbitration of family law is the inherent inequity between men and women in most religious contexts and the resulting imbalance of power between them when a dispute arises. The submission from the Women's Legal Education and Action Fund (LEAF) points out:

> It is concerning—though not necessarily surprising—that the desire to apply religious principles has arisen in the context of family law, where what is at stake is control and support of women and children. Many of the ideas put to rest through family law reform were originally grounded in religious precepts; it is entirely contradictory, therefore, to permit the potential resurfacing of such ideas in the name of religious freedom.[137]

The Canadian Council of Muslim Women points out that what the many forms of Muslim family law have in common is that they perpetuate a patriarchal model:

> The jurisprudence of fiqh does have some common understandings. It is based on a patriarchal model of community and of the family. It is generally accepted that men are the head of the state, the mosque and the family. The responsibilities outlined for males is that they will provide for their families and because they spend of their wealth, they have the leadership to direct and guide the members of their families, including the women. …Most proponents of Muslim law accept that men have the right to marry up to four wives; that they can divorce unilaterally; that children belong to the patriarchal family; that women must be obedient and seek the male's permission for many things; that if the wife is "disobedient" the husband can discipline the wife; that daughters require their father's permission to marry and she can be married at any time after puberty. A wife does not receive any maintenance except for a period of three months to one year and most agree that the children should go to the father usually at age 7 for boys and 9 for girls. If the wife wants a divorce she goes to court, while the husband has the right to repudiate the union without recourse to courts. Inheritance favours males, [because it is argued that they are responsible for the costs of the family] to the extent that the wife gets only a portion at the death of the husband.[138]

The CCMW balanced this view with the rights of women as they exist in Islamic personal law:

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[136] Submission of Karen Graham (September 22, 2004).

[137] Submission of Legal Education and Action Fund (LEAF) (September 17, 2004).

[138] Submission of the Canadian Council of Muslim Women (July 23, 2004).

> In this patriarchal model, women do have rights. The woman keeps her wealth, if she has any; she is provided with a "gift" at the time of marriage (*Maher*, which could be an iron ring, or goats or property or gold or money), she inherits in her own right; in theory she does not have to share in the provision of the household needs, and she keeps her own name. In return, she accepts the patriarchal model and the prescribed roles for herself and her male relatives, including her husband.
>
> The language used by those who espouse these traditional interpretations make a distinction between equity, complementariness and equality. A woman is not equal to a man, she has a role which complements that of a man, and a woman is to be treated with "equity" which means with kindness and gentleness.[139]

Homa Arjomand and her Coalition speak far more bluntly about sexism in Islam:

> Shari'a considers women to be a potential danger by distracting men from their duties and corrupting the community. It therefore suppresses women's sexuality, whilst men are given the rights to marry up to four wives and the right to temporary marriage as many times as they wish. Young girls are forced to cover themselves from head to foot and are segregated from boys. These laws and regulations are now implemented in Canada, but are usually hidden from secular society although, some, such as what happens in Islamic elementary and secondary schools, are visible. According to Shari'a law, a woman's testimony counts for only half that of a man. So in straight disagreements between husband and wife, the husband's testimony will normally prevail. In questions of inheritance, daughters receive only half the portion of sons and in the cases of custody, the man is automatically awarded custody of the children once they have reached the age of seven. Women are not allowed to marry non-Muslim whereas men are allowed to do so.
>
> The message is clear: men dominate, women obey. A woman does not have the right to choose her husband, her clothing, her place of residence, and cannot travel without husband's consent. The danger is that once these tribunals are set up, people from Muslim origin will be pressured to use them, thereby being deprived of many of the rights that people in the west managed to gain.[140]

According to the exhaustive study completed by Women Living Under Muslim Law, marriage in Muslim law is based on a contract, usually negotiated on behalf of a young woman by her father or other male figure, acting as a "marriage guardian." In most traditions, the woman has to agree to the marriage; however, the meaning of consent may not meet any standards recognizable by Canadian law. The Review heard of many instances where women were contracted to marry without their knowledge and then could not invalidate the contract subsequently. In many cases, there is little emphasis on an attraction between the two parties; the more important issue is whether the match will be advantageous to both the groom's and the bride's family and status. In some traditions, marriage can be forbidden between two parties who are not of the same social status.

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[139] Submission of the Canadian Council of Muslim Women (July 23, 2004).

[140] Submission of Homa Arjomand (July 21, 2004).

In general, Muslim girls are deemed to have reached maturity at the age of puberty; while some more modern Islamic countries enforce age of consent rules with respect to consent to marry, others do not. Many of the respondents to the review spoke of the frequency with which young girls are betrothed at very early ages, often to men many years their senior. In these cases, the woman herself may not have been a direct party to the marriage contract and certainly would not be considered capable of making such a contract under Canadian law. Although in some cases the contract is written, in others it is not. Some versions of Muslim law require that the signatures of the bride and groom be witnessed; others do not.

If arbitration is named as a means for settling future disputes in the marriage contract, a woman may be held to a clause requiring religious arbitration, if the marriage contract is a valid arbitration agreement under Ontario law. Many of these marriage contracts may have been arranged in their country of origin because the parties to the contract are recent immigrants. Also, it is not uncommon for an unwed Muslim from Canada to seek a marriage in his country of origin and then return to Canada with his spouse.

All traditions have some form of *mahr*, or marriage gift, but the conditions under which this is payable vary widely. The *mahr* is a financial protection for the wife, and may be payable only at the point of marriage breakdown. In some traditions only the man can divorce (*talaq*); in others, women may negotiate the right to initiate divorce into the marriage contract or have that capacity because of a lack of conjugal relations, desertion by the husband, or non-maintenance within the marriage.[141]

The Review heard that, because the entire premise on which arbitration rests is that both parties freely choose this method of resolving disputes, the issue of choice for women, given the patriarchal nature of Muslim society, is essential to the argument of those opposed to, or at least skeptical about, the use of religious principles for arbitrating family law:

> LEAF is concerned that arbitration may not be chosen freely in many circumstances. For some women there may be very strong pressures based on culture and/or religion, or fear of social exclusion. These issues may be very real in faith-based communities, where some women may be called a bad adherent to a particular faith or even an apostate if they do not comply with arbitration. Such condemnation would leave such women very alone, shunned in their communities or even their houses of worship, and would only compound feelings of alienation created by a family break-up. In addition, there are many women whose economic lives depend on a close association with their faith-based community or cultural group. This is particularly true of immigrant women who

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[141] Women Living Under Muslim Laws, *Knowing Our Rights: Women, family, laws and customs in the Muslim World*, (London: Women Living Under Muslim Laws, 2003).

> find jobs first in their own communities. These women may be particularly vulnerable to community pressure and may lose their jobs if they do not comply with arbitration. Some women may also fear immigration consequences. For other women there may be fear of violence. In some cases it may be a lack of resources or information. When these conditions are present it is not accurate or reasonable to suggest that arbitration is being chosen freely. Education is not enough to overcome these pressures, at least not in the short term, and particularly where women's sources of information are primarily found in local media such as community papers or radio, where there may be little critique of patriarchal points of view.[142]

Many correspondents shared a similar concern:

> Religious leaders (Christian, Jewish or Muslim) and community leaders (in the case of First Nations Canadians) are primarily male, and primarily traditionalists, who hold tightly to outdated beliefs and outdated laws that in some cases withhold the freedoms so held in esteem by Canadians. Traditional culture tends to be male dominated—the concept of women "voluntarily" agreeing to faith-based arbitration will never be an option for many women, especially immigrants and First Nation women with lower levels of literacy and education and reduced self esteem and control over their own lives.[143]

Gila Stoper, writing in the Columbia Journal of Gender and the Law, urges:

> …when examining cases in which the conflict between women's rights and religious and cultural practices arises, we should not concentrate on the question of choice, but on the question of disadvantage, and ask ourselves whether the practice in question disadvantages women. If the answer to this question is affirmative, then the disadvantageous practice should not be allowed unless overwhelming evidence proves that the practice is consented to by all the women involved, out of their own, genuine free choice.[144]

The National Association of Women and the Law make a similar point:

> In the context of battered women and mediation, it has been noted that:
>
> > [t]he reality is that a battered woman is not free to choose. She is not free to elect or reject mediation if the batterer prefers it, nor free to identify and advocate for components essential to her autonomy and safety and that of her children…
>
> This comment is equally relevant to battered women agreeing to arbitration. It is highly unlikely that a battered woman will be capable of negotiating the terms of an arbitration agreement in a way that is fair to her interests. New immigrant

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[142] Submission of Legal Education and Action Fund (LEAF) (September 17, 2004).

[143] Submission of Submission of Karen Graham (September 22, 2004).

[144] Gila Stopler, 'Countenancing the oppression of women: How liberals tolerate religious and cultural practices that discriminate against women' (2003) 12:1 Columbia Journal of Gender and Law 154 at 218-9.

> women from countries where Sharia law is practiced are particularly vulnerable because they may be unaware of their rights in Canada. These women may be complacent with the decision of a Sharia tribunal because arbitral awards may seem equal to or better than what might be available in their country of origin. An immigrant woman who is sponsored by her husband is in an unequal relationship of power with her sponsor. It may be impossible for a woman in this situation to refuse a request or order from a husband, making consent to arbitration illusory. Linguistic barriers will also disadvantage women who may be at the mercy of family or community members that may perpetuate deep-rooted patriarchal points of view.[145]

The Muslim Canadian Congress maintains that allowing the use of Muslim law

> …ghettoizes the Muslim community, which otherwise spans five different continents covering 1.3 billion people, in an extensive array of sects languages, cultures, and customs, all into one second-class compartment in the determination of human and family law rights, which are of public importance and domaine…all of this, behind the dishonest guise of religious tolerance and accommodation.[146]

The majority of respondents opposed to the use of religiously based arbitration maintained that women in relatively closed Muslim communities have no way to know what Canadian law is and no idea of the consequences of choosing religious law instead of going through the courts.

It became clear that many of those making presentations did not themselves understand how Canadian law would impact on traditional practices. For example, the Islamic Council of Imams expressed concerns about the impact of Muslim men having more than one wife and family, worrying that women and children could be left destitute. While this is certainly a concern, it indicates that there is a lack of familiarity about support obligations under the *Family Law Act*. Similarly, many respondents seemed very unsure of the division between criminal and civil law in Canada, often having lived in places where both are part of a Shariah regime. This confusion allowed misconceptions about the ability of arbitrators to order penalties such as stoning or beating or public humiliation, if marital infidelity were alleged. Many of these same respondents, however, acknowledged that the lack of knowledge in the courts of the elements of Muslim marriage contracts is also a concern, in that women going through the Canadian courts may not have their entitlement to *mahr* recognized by the courts and may be required to assume support obligations they would not have under Islamic personal law.

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[145] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004) citing B. Hart, 'Gentle Jeopardy: the Further Endangerment of Battered Women and Children in Custody Mediation' (1990) 7 Mediation Quarterly 317 at 321.

[146] Submission of the Muslim Canadian Congress (August 26, 2004).

The Review repeatedly heard from those opposed to religious arbitration that women would be disadvantaged if an arbitration decision violates the provisions of the *Arbitration Act*, because they would not be able to take their issue to the court, given the unequal balance of power outlined above. This led many of the respondents to suggest that it was of no use to try to remedy the *Arbitration Act* by allowing additional grounds for judicial oversight, since vulnerable people would have no capacity to go through the court process required to overturn an arbitral decision and would likely be subjected to even more coercion should they try to have a decision overturned by the court.

Homa Arjomand argues:

> While, technically, all Muslim women have access to Canadian laws and courts, and while the Canadian legal system would reject the oppressive decisions made under Shari'a as being contrary to Canadian law, the reality is that most women would be coerced (socially, economically and psychologically) into participating in the Shari'a tribunal. Women are told that the Shari'a Tribunal is a legal tribunal under the Arbitration Act 1991. The women would take that to mean that whatever is decided by the Tribunal would be considered as lawful. Even women who know that Canadian law would not uphold the decisions would not challenge the decisions for fear of physical, emotional, economic and social consequences. Therefore, it is most unlikely that decisions that are contrary to Canadian law would ever come before the courts.[147]

Initially, I found this argument somewhat puzzling since those who argued women's inability to take matters to court were also advocating that all family matters go to court for decision in the first place. As I pointed out earlier in the report, in almost all areas of Canadian law, the affected party must take the initiative to seek a remedy available in law and must be prepared to participate on her own behalf. The law can provide effective tools, but the concerned party must be prepared to use those tools in order to gain the benefit of the law.

However, I came to understand that the argument is as follows: if women are not required to choose between dispute resolution methods but rather are required to go through the court system, there will be no shame to them or to their spouses because the law requires them to take that route. In addition, according to many respondents, the courts will offer women some protection, even if they are not able to argue effectively on their own behalf. This hope, too, is at odds with the complaints made by advocates for vulnerable women whose experiences in Ontario courts do not reflect this protective image. Because of the compounding nature of multiple disadvantages, the experiences of minority women may be particularly difficult. Even so, according to many respondents, women will fare better in the courts than in private arbitration.

Many of those opposed to religious arbitration using Islamic personal law are convinced that establishment of tribunals is merely "the thin edge of the wedge." They believe that those advocating for arbitration of family law issues really have as their ultimate goal the establishment of a full Islamic system of justice within Canada to which all Muslims must submit. The Muslim Canadian Congress states:

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[147] Submission of Homa Arjomand (July 21, 2004).

> This insidious and discriminatory ghettoization and marginalization, into "out of sight" only plays into:
> i. The hands of the extremist political and ideological agenda of a certain sector of Muslim-Canadian proponents of "Muslim Law" that is antithetical to the Canadian Constitution and values; and
> ii. Equally into the hands of the reactionary, intolerant and otherwise racist segments of Canadian non-Muslim society who want nothing better than to exclude Muslims from the mainstream.[148]

Homa Arjomand agrees that the issue of political identity is at the root of the Islamic Institute of Civil Justice's entry into the arbitration market:

> We strongly believe that Shari'a tribunals will crush women's civil liberties. It will enforce brutal laws and traditions on abused women who are living under the intensive influence of Islam. These tribunals will apply Islamic Shari'a law which will compel abused women to stay in abusive relationship and will give them no choice but to be obedient or attempt suicide… There must be no state within a state. The Islamic advocates argue that, as Mr. Momtaz Ali stated in his proposal, it is their duty as good Muslims to work towards their own state. They also emphasize that there should be no separation between religion and the law.[149]

The Canadian Counsel of Muslim Women asks:

> As the proponents claim that God wants them to live under Sharia/Muslim law, the question then arises as to why are they advocating for only one aspect of Muslim jurisprudence? Why the focus only on family law and not on the whole, total system of laws including criminal? Or will this be the second stage of their demand of religious right?[150]

These fears do have some basis in fact. As early as 1991, in a paper entitled "Oh! Canada—Whose land, whose dream?" Syed Mumtaz Ali, commenting on the issues of sovereignty association as it was envisioned by Quebec, was advocating that Muslim's have control over their own personal law:

> Canada also will not fall apart or into an abyss of chaos if Muslims are permitted to control their own affairs in the realm of Muslim personal/family law. Canadians should look at this matter, not as if they are losing control, but as if they were broadening the mandate of sovereignty, and thereby enhancing the quality of that

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[148] Submission of the Muslim Canadian Congress (August 26, 2004).

[149] Submission of Homa Arjomand (July 21, 2004).

[150] Submission of the Canadian Council of Muslim Women (July 23, 2004).

> sovereignty. In any event, establishing such a system of law is not something that is either impossible or impractical.[151]

Indeed, in the most recent update of Mumtaz Ali's website, he refers to the setting up of his organization, *Darul Qada*, as "the beginnings of a Muslim Civil Justice System in Canada." Although during the consultations, he seemed to accept the reality that using the *Arbitration Act* for a limited number of personal law issues is not the same as having a "system" of justice, he persists in using this language, thus exacerbating the concern that the use of Muslim family law in arbitration is just a starting point in the quest for sovereignty for Muslims within Canada. I will look in more depth at the issues of political identity in Section 6 of the Review Report.

Theme: Arbitration Should be Allowed in Family Law, Using Religious Principles.

Arbitration in family law matters using religious principles is already being done by a number of faith groups. It will be helpful to outline the services offered by a few of these so that the current situation is more clearly understood.

The use of arbitration based on religious law is most familiar in Ontario in the context of the Jewish faith. In Ontario, the Jewish Court in Toronto is called the Beis Din of the Vaad Harabonim, made up of ordained Rabbis who have a higher ordination as Rabbinic Judges. It has been operating for many years. According to the information given to the Review by representatives of the Beis Din, Orthodox Jews are forbidden to bring a lawsuit before secular judges. There is a strong emphasis on helping the disputants to reach an agreed settlement of issues and only if a matter cannot be settled through agreement, will arbitration prevail. Enforcement of arbitration decisions is through the court, pursuant to the *Arbitration Act*. As I pointed out earlier, in the vast majority of family law cases, in the Orthodox, Conservative and Reform traditions of Judaism, parties approach the Beis Din only for a *get*, the religious divorce necessary to satisfy the requirements of Jewish law.

However, in about thirty cases a year the Beis Din may deal with all issues, such as support, property division, custody and access, according to the oral presentation of Rabbi Reuven Tradburks, Secretary of the Beis Din. In such cases, a contemporaneous written arbitration agreement is required, even if arbitration has been agreed to as the method of dispute resolution in a marriage contract. In many cases, although not all, the parties have received independent legal advice. However, even if they have a legal representative, that representative may not argue the case in front of the Beis Din as it is the responsibility of the parties themselves to make their own case. The Beis Din has volunteer members of the community who have expertise in Ontario family law who offer legal advice to the Beis Din when requested to do so. The Beis Din will also accept expert written evidence if that is deemed necessary to the case. The cost of such arbitrations is deliberately kept as low as possible to ensure that cost does not prevent a Jewish couple from seeking this form of dispute resolution. Custody decisions are in the best interests of children and financial issues are consistent with the principles of Ontario's *Family Law Act*.

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[151] Syed Mumtaz Ali, 'Oh! Canada—Whose land? Whose dream?'(The Canadian Society of Muslims, 1991, online: < http://muslim-canada.org/ocanada.pdf>.

Orthodox Jews are strongly encouraged to bring their disputes before the Beis Din. Rabbi Reuven Tradburks has stated: "In this city (Toronto) we actually push people a little to come [to arbitration by Jewish law] because using the *Beis Din* is a *mitzvah*, a commandment from God, an obligation." [152]

Rabbi Tradburks indicated orally in his presentation to the Review that, although community pressure, such as shunning or naming, is rare, the community does occasionally make public the refusal of members to follow the decisions made by the Beis Din as a method of ensuring enforcement of arbitration awards.

Mediation and arbitration are also done by some Christian organizations. The Review received a very thoughtful submission from the Christian Legal Fellowship, a national organization of about four hundred lawyers, law students, professors and other professionals who, "among other things...explore the complex interrelationships between the practice and theory of law and Christian faith." [153] One of the prime objectives of the group is to promote alternative dispute resolution:

> There are important reasons why communities of faith may wish to resolve disputes within the tenets of their faith, rather than through the secular system of lawyers and courts. Many of these communities may feel that their core values, including the sanctity of the nuclear family are threatened by having their disputes resolved outside of their faith community by persons having no familiarity with their belief system. In order to protect against further erosion of these values, many wish to resolve disputes in accordance with the teachings of their holy books and laws with the assistance of a mediator or arbitrator from within their faith community. Not only may this be the preference of the parties, it is often a requirement of their faith teachings.[154]

A representative of the Salvation Army spoke about resolving marital issues between Army officers who have made commitments to a way of life upon becoming full-fledged officers and sometimes seek release or dispensation from these commitments as a result of marital breakdown. Although every effort is made to mediate in such situations, arbitration panels may be necessary to resolve matters that cannot be agreed upon by the parties. Similarly, representatives of evangelical groups suggested that arbitration may be a useful means of resolving issues if there is a breakdown in the growing number of "covenant" marriages being contracted within those faith groups.

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[152] Lynne Cohen, 'Inside the Beis Din' *Canadian Lawyer* (May 2000) at 30 quoted in submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).

[153] Submission of Christian Legal Fellowship (August 27, 2004).

[154] Submission of Christian Legal Fellowship (August 27, 2004).

There are mediation and arbitration services that are currently being offered within the Muslim community and that made presentations to the Review about their services. All emphasized that resolving disputes peacefully is a major goal within the Muslim faith. This is expressed most succinctly in the submission from the Ismaili National Conciliation and Arbitration Board for Canada, which states in its preamble to the "Rules of Arbitration" governing the Board:

> …when differences of opinion or disputes arise between them, these should be resolved by a process of mediation, conciliation and arbitration within themselves in conformity with the Islamic concepts of unity, brotherhood, justice, tolerance and goodwill.[155]

The Shia Imami Ismaili Muslims (Ismailis) have developed a model of conciliation and arbitration that is the most sophisticated and organized structure in the Muslim community to date and I am going to spend considerable time outlining its origins and activities, as it was mentioned many times by other respondents as an example of what is possible under religiously-based mediation and arbitration.

Unlike the Sunni Muslims, who hold that each individual is responsible for his or her own interpretation of the will of Allah, the Shia recognize the authority of hereditary Imams:

> The essence of Shiism lies in the desire to search for the true meaning of the revelation in order to understand the purpose of human existence and its destiny. This true, spiritual meaning can never be fettered by the bounds of time, place or the letter of its form. It is to be comprehended through the guidance of the Imam of the time, who is the inheritor of the Prophet's authority, and the trustee of his legacy. A principal function of the Imam is to enable the believers to go beyond the apparent or outward form of the revelation in search of its spirituality and intellect. …The Shia thus place obedience to the Imams after that to God and the Prophet by virtue of the command in the Quran for Muslims to obey those vested with authority.[156]

The Ismailis recognize the authority and the hereditary succession of His Highness Prince Karim Aga Khan, the 49th Imam in a direct lineal descent from the Prophet Muhammad through his daughter Fatima and son-in-law Ali. He leads Ismaili's settled throughout twenty-five countries in both the developing world and the industrialized world.

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[155] Submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada (September 10, 2004).

[156] Submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada (September 10, 2004).

> Under the leadership of Aga Khan IV, thus, the institutions of the Imamat have expanded far beyond their original geographical core and scope of activities. Many new humanitarian, social, cultural and economic development institutions have been founded reflecting, and responding to, the changing global situation and the present complexity of the development processes which call for an integral multi-programmatic approach to issues of development. With their own mandates in their respective spheres, these institutions, therefore, work together within the overarching framework of the AKDN [Aga Khan Development Network], so that their different pursuits interact and reinforce each other. An autonomous initiative under the leadership of the Ismaili Imamat, their main source of support is the Ismaili community with its tradition of philanthropy, voluntary service and self-reliance, and the material underwriting of the hereditary Imam and Imamat resources. [157]
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> By tradition, the hereditary Imam—spiritual leader—of the time ordains a constitution for the social governance of the community and its relationship to other communities. The constitution is periodically revised in light of changing needs and circumstances. …The constitution ordained in 1986 established a well-defined institutional framework for the Ismaili community through which to address, for example, the health, education, economic and social welfare aspects, as well as the religious aspects, of the daily lives of Ismailis. This institutional framework includes a dispute resolution system. …The Constitution established National Conciliation and Arbitration Boards for each of the jurisdictions specified in the Constitution. [158]

The Ismaili Conciliation and Arbitration Boards (CABs) operate in fourteen jurisdictions around the world. In Canada, there are five Regional CABs and a National CAB. The National CAB develops policies and programmes and the cases are dealt with mainly in the Regional CABs. There are formal rules for both conciliation and arbitration, which were adopted in 1990; the full text of these rules can be found in Appendix IV and Appendix V respectively.

All CAB members are volunteers, appointed by the Aga Khan for three year terms, and comprising lawyers, social workers, businesspersons, other qualified professionals and past senior community members. The membership, currently 34, is gender balanced, with 16 of the members being women.

> The primary objective of the Ismaili CAB system is to resolve disputes in an equitable, speedy, confidential, cost effective and constructive manner in a culturally sensitive environment with due regard to the interests of all parties. The system seeks to maintain harmony between parties and thus within the

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[157] Submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada (September 10, 2004).

[158] Submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada (September 10, 2004).

community ("no winners or losers") and to minimize acrimony and emotional damage as well as to minimize the financial costs of conflict for all parties.

In light of these objectives, the CAB system in Canada is guided by the following principles:

- Before mediating or arbitrating on any dispute, the CABs must first satisfy themselves that the parties to the dispute have come to the CABs voluntarily and out of their own free will and desire to have their disputes resolved through the CAB system;
- The mediation and arbitration processes are conducted by CAB members who have received appropriate training to ensure their competent and equitable handling of the matter;
- The processes are conducted in accordance with rules that are intended to assist in assuring the appropriate standard of operation;
- The duty of confidentiality to the parties to a dispute must be absolutely respected.[159]

Women and men have accessed the CAB process in equal numbers. The services are free, although the parties are responsible for the costs of preparing their case and obtaining legal or financial advice. The CABs save both time and money, not only for the participants, as the Submission points out, but also for the court system.

The Submission provided a summary of the number of cases and the success of the process for the period 1998 – 2003 which appears below:[160] It is important to note, when looking at "success rates," that in this model parties may opt out of the arbitration process at any time.

Number of Cases	**769**
- Number of Region Specific Cases	661
- Number of Inter-Regional and International Cases	108
Nature of Cases	
- Matrimonial	63%
- Commercial	29%
- Other (including inheritance cases)	8%
Success Rate	**69%**

The Submission concludes:

> The Ismaili CAB system is rooted in tradition, yet its modern infrastructure interfaces comfortably with the national legal systems within which it functions. The CAB system is grounded in the ethics of the faith and complies with the laws

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[159] Submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada (September 10, 2004).

[160] Submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada (September 10, 2004).

> of the various lands where the Ismaili community live. In addition, the community context of the CAB system makes it a system that goes beyond pure dispute resolution, addressing also dispute prevention and the possibility of wider support for parties to a dispute.
>
> The Ismaili CAB system in Canada serves the Ismaili community well and has demonstrated its value and effectiveness as an ADR system. It operates in a manner that keeps at the forefront the need for equity among parties whatever their gender, financial resources or relative positions. The system respects the parameters of the Ontario Government's Arbitration Act, 1999 [sic] which recognizes the value and contribution of ADR systems and encourages resolution of disputes outside of the legal system in a fair and equitable manner within the confines of the law of the land.[161]

Another example of an arbitration service that operates under Muslim law is that provided through the Masjid El Noor in Toronto, a Sunni mosque. Led by its director and chief mediator, Mubin Shiakh, the delegation to the Review from Masjid El Noor argued passionately against the negative perspective on Muslim family law provided by such groups as the Coalition Against Sharia Court in Canada and the Canadian Council of Muslim Women. Formally since 1982 and informally prior to that, the Masjid El Noor has offered a continuum of counseling, mediation and arbitration services to its community; these activities are carried out from a pastoral care point of view. Often called upon by the family courts to mediate and sometimes arbitrate, it has won the respect and confidence of the court in its ability to resolve disputes within the Muslim context, according to letters provided to the Review.

Masjid El Noor's mediation board consists of seven people, one of whom is an imam and the rest of whom are divided equally between men and women. Each hearing panel consists of one man, one woman and the Imam. Most of the mediators are professionals who donate their time as part of their volunteer service to the community. The hearings take place on Sundays between 11 A.M. and 5 P.M. Most hearings last approximately an hour and the process is confidential. Mediations and arbitrations are strictly voluntary, and each party must sign the arbitration agreement. Notes are kept of the proceedings. Mediation and arbitration emphasize the availability of the courts to all clients; parties are provided with the pamphlet, "Family Law in Ontario" and Masjid El Noor has provided translations in Gujurati and Urdu to those who need services in other languages. [162]

Masjid El Noor labeled the concerns of the opponents of religiously based arbitration as "fear-mongering and fabrication."

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[161] Submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada (September 10, 2004).

[162] Submission of Masjid El Noor (August 24, 2004).

> Masjid El Noor has dealt with many cases and none of what was said would happen, happened. …In fact not a single case has been appealed to the Ontario Court even though as a rule, we give that option to disputants at the outset.[163]

These two examples show that Muslim family law has been and is being used now to resolve disputes successfully in both Shia and Sunni contexts. The Review heard from many groups that similar sorts of services are available through other mosques and Islamic Community Centres throughout Ontario; these services may be more or less formally structured, and may be organized as mediation or conciliation rather than binding arbitration. One of the concerns expressed by respondents is the lack of uniformity in structure and policies, so that it is difficult for those seeking assistance to know exactly what the legal status of the dispute mechanisms available to them really are. Certainly, the Review heard of situations where Imams and other leaders in the community, who do not have knowledge of Canadian family law and who may not even have much formal training in Muslim law, are deciding disputes for Muslims who believe they are required to follow the decisions, because they emanate from their faith community and they want to be obedient to their faith.

In many cases, the decisions are based on cultural traditions and may be in direct contravention of Ontario and Canadian law. The Review heard of instances where girls, well below the age of consent, were being forced into marriages and bearing children while still adolescents themselves. The Review also heard that some Imams and leaders continue to celebrate polygamous marriages, even though such actions are clearly against the *Criminal Code of Canada*. Aly Hindy, Imam of the Alaheddin Mosque, is quoted as saying:

> The *Qur'an* says a man is limited to four wives. Canadian Law doesn't allow it—God does, so I marry them myself. …If your wife doesn't like sex, you can take another wife. If she can't give you children, you can take another wife. If a man is financially capable and a woman doesn't have a husband, you can marry her as well.[164]

It is in this context that the Canadian Society of Muslims, represented by Syed Mumtaz Ali, has advocated for a more formal establishment of Muslim mediation and arbitration services over many years. The group made a presentation to the Ontario Civil Justice Review Task Force in 1994, advocating the following changes to Ontario law:

1. Appropriately amend the Practice Direction re court-based ADR Pilot Project to permit as an option private arbitration for determination of matrimonial matters. Where both parties are Muslim, they may be permitted to enter into an arbitration agreement to have matters determined in accordance with the principles of Islamic law.
2. Matters of Muslim intestate succession be permitted to be settled in similar fashion. Changes to the law will have to be made, if needed.

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[163] Submission of Mubin Shaikh, 'Shariah Tribunals and Masjid El Noor: A Canadian Model' (August 24, 2004).

[164] Sally Armstrong, 'Criminal Justice' *Chatelaine* (November 2004) 152 at 158.

3. In cases of uncontested joint petition for divorce, Marriage Officers appointed under the Ontario Marriage Act be empowered to solemnize and register Muslim divorces following procedures similar to the procedures of the Marriage Act.
4. In case of uncontested joint petition for divorce, both Muslim spouses be permitted to waive the mandatory one-year separation requirement and/or abridge the time for finalizing the divorce proceedings.
5. As an alternative to private arbitration under a court-based ADR system, when dealing with divorces where both parties are Muslim, an independent, private arbitration system managed by local Muslims could be put in place on lines similar to those followed by Muslim Marriage and Divorce Act of Trinidad and Tobago.
6. As a further alternative, fully incorporate Muslim personal/family law into the regular Ontario civil justice/family law system, thereby taking control of the whole administration and enforcement of Muslim family law provisions.
7. Extend the unified family court system to the whole of the province of Ontario.[165]

This vision resulted in the fall of 2003 in a convention called to form the Islamic Institute of Civil Justice. An elected committee of thirty members was formed and given a mandate to incorporate and develop by-laws to govern the Institute. The Letters Patent of Incorporation #1579565 were granted as of the 15th of January 2004. Elections for officers (3), Executive Council (6) and General Council (30) were completed in February 2004. The name "Darul Qada—Muslim Court of Arbitration" was registered under the *Business Names Registration Act*, and the announcement of the establishment of the Institute was made in March 2004. The Institute incorporated as a business and is seeking clients to participate in mediation and arbitration under its auspices. According to Mumtaz Ali, "arbitration cannot apply those provisions of Muslim law/Shariah, which do not agree with Canadian laws or Canadian value system." However, he says in the same paper, after holding forth on the superiority of Muslim law,

> The Quran tells us about the root-source of every action. Every act, deed, or movement of a Muslim must consequently be in accord with Muslim law/Sharia injunctions. A Muslim cannot be a Muslim without obeying Muslin law in its totality.[166]

A group which had originally been affiliated with the Islamic Institute of Civil Justice broke away from that organization just prior to its incorporation as a business. According to its submission to the Review,

> Our group first began to organize as the Islamic Institute of Civil Justice. However, some friends who were with us created confusions by using terms such as Sharia Courts and political efforts, etc. Their confusion caused a vast reaction and some unfounded fears. We separated our organization and

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[165] Syed Mumtaz Ali, 'Islamic Institute of Civil Justice and Muslim Court of Arbitration' (Muslim Society of Canada, 2003).

[166] Syed Mumtaz Ali, News Bulletin, (Canadian Society of Muslims, August 2004) at 2, 6.

> registered as Dar-ul-Qada (Canada) Inc. …a non-profit organization…which seeks to provide humanitarian services to the Muslim community in Ontario. …as outlined…our aims and objectives include setting up facilities for the destitute children, men and women affected by family disputes, set up psychological clinics and mediation centres and all other related activities to serve the community. The Organization also seeks to provide an alternative dispute resolution forum in which trained Muslim professionals will be able to mediate, arbitrate and resolve civil and family disputes among Muslim citizens residing in Canada under Muslim traditions, to the extent permitted by Canadian legislation.
> …the misapplication of Sharia has caused numerous human rights violations in several countries around the world. We wish to inform you that, in addition to operating under Canadian and human rights legislation, the Organization's goal is to operate under Islamic Legal Principles which include: social justice, equality of human beings including gender equality, security of life, liberty and property among many other such rights. We inform you that part of the social mandate of the Organization includes taking steps to address the cultural oppression of women, children and any other kinds of social injustice. Our position is that the Organization is fully committed to addressing the cultural issues of social injustice which led to the misapplication of the Sharia in the past. [167]

Every submission we received from those advocating for the continued use of religiously based arbitration stressed the importance for people of faith to have the opportunity to live in the world according to their beliefs, even if those choices affect their material well being. A couple of those eloquent arguments are worth repeating here:

> By choosing to utilize a system of religious arbitration the parties are doing two things: adhering to their faith; and resolving the dispute on the basis of their religious law, rather than the secular civil law. So long as the choice to do so is a free, informed and voluntary one, and there is no contravention of the Charter of Rights, not only should they be permitted to do so, they have a right to do so as part of the expression of their freedom of religion.
>
> Simply stated, a secular court or tribunal bases its decision on all of the applicable state law. The religious-based system treats the tenets of the faith as paramount in reaching its decision. The conscious and voluntary decision to participate in the faith-based systems includes a knowledge that in doing so, rights that exist in the secular system may be given up. Using a Christian as a specific example, by choosing to have a Christian arbitrator and instructing that the decision is to be resolved according to Biblical principles, it is more important to that individual that the dispute is resolved Biblically than that the outcome be in his or her favour.[168]

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[167] Submission of Husain Bhyat for Dar-Ul-Qada (August 27, 2004).

[168] Submission of Christian Legal Fellowship (August 27, 2004).

> …one can easily understand that the reason why a Muslim chooses to go to a *Muslim Court of Arbitration* instead of a secular Canadian court, is that he or she must bring in a spiritual dimension and let this spiritual consideration play a determining role. A Muslim, consequently, makes their decision in this respect not because they are likely to get the same or better rights or material benefits from a Canadian Court or the Muslim Court. …a Muslim must take their dispute for settlement so as to be a good Muslim.[169]

Other submissions based their arguments on the *Charter* right to freedom of religion. While this is not the position of the Review, the Submission from B'nai Brith Canada explains this view most clearly:

> It is B'nai Brith Canada's view that under the Canadian Constitution (Constitutional Act, 1982), Jews and indeed all faith based or religious groups are guaranteed the right to contractually operate their own courts of arbitration in family law and other matters, so long as the participants do so voluntarily and with due process and fairness. Specifically, Section 27 of the Canadian Charter of Rights and Freedoms, 1982, provides that the Charter "will be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians" [*emphasis added].* This provision determines that Canadian society will be an open and pluralistic society that must accommodate different religious practices. …B'nai Brith supports the integrity of the freedom of choice of any individual, who, for religious reasons, wishes to participate by reason of his or her own conscience in such religious courts and thereby consult his or her own religious traditions, so long as it is done consensually or voluntarily. It is the right of all those residing in Canada to be treated equally, no matter what their religious background, as set out in Section 15 of the Canadian Charter of Rights and Freedoms, 1982.[170]

The Masjid El Noor submission made a number of points not articulated in written submissions from other respondents but mentioned by many during the oral consultations:

> The first and foremost reason is because it is an Islamic tribunal and presided over by trained community leaders, giving it the credence it needs within the Muslim community. This ingredient offers the legitimacy factor of the equation. Its importance is clear when decision in favour of women are made against men who are ignorant of the rights of women afforded in Islam. The authority of the Tribunal will prevent a disputant from accusing it of ignoring their Islamic values—a claim frequently made against the secular system. Through this authority, the community will pressure the wrongdoer to conform to the norm and encourage him/her to cease their sinful behaviour. Finally, it will ensure that justice is administered by holding the person acccuntable to the very Deity he/she worships—an extremely powerful deterrent against non-compliance.

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[169] Syed Mumtaz Ali, News Bulletin, (Canadian Society of Muslims, August 2004) at 6.

[170] Submission of B'nai Brith, 'Review of the Arbitration Process in Ontario' (August 31, 2004).

> …This is valuable to the discourse on the compatibility of Islam with democracy. *Far from being a signal to the despots of the world that misuse Islam, it is a loud* cry against them and a solid proof that Islam is flexible enough to work within the current Western systems. This point should be a very important one to consider because it gives the state direction as to how it will proceed with its Muslim population—a clash of civilizations or an embrace. ...It allows the Muslim community to be able to engage their problems from within and not imposed upon them from unauthorized external agents [*Note: Here, secular courts are referred to as "unauthorized" from the religious standpoint.*] [171]

It was interesting that this issue of decisions being more enforceable was raised with respect to non-religiously based family law arbitration as well. There seemed to be a general consensus among those favouring the use of arbitration that taking part in the decision, rather than having it imposed from the outside, helped recalcitrant parties to comply even with decisions they did not like.

One submission, from Fathercraft Canada, compared the use of religiously based mediation and arbitration as inherently more fair and equitable than the court system:

> Sharia "law" is a faith-based approach to dispute resolution. It is useful to look at the history of faith, spirituality and religion in the settlement of disputes. While religion has been used by opportunists and extremists to enflame conflicts and justify violence, it has a long history of thought and efforts by enlightened men of faith to resolve conflict. It could be argued that Jewish law, Christianity, Sharia law, native healing circles and religions in general are, in essence, non-violent or violence-reducing conflict resolution systems. The adversarial court system arises from the concept of each side hiring a warrior to fight a battle on their behalf, so is inherently violent in origin. We argue that faith-based arbitration and mediation are superior to the adversarial court system because of the following:
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> - The two sides mutually agree upon the arbitrator which they respect, whereas they do not have any choice of the judge and usually one party is dragged into court against his or her will (family law judges and lawyers are the least respected and most hated in the legal system).
> - Arbitrator has more invested in finding a comprehensive, permanent solution (otherwise the problem to return to the arbitrator, whose reputation is reduced), while judges ignore failed solutions, passing responsibility on to appeals courts or other judges.
> - Rules of fairness, openness and explaining decisions underlie arbitration, whereas in family court, mothers and fathers complain of money, process, false accusations and opaque procedures being used to manipulate the court into incomprehensible or incomplete decisions.
> - The beliefs of the arbitrator are clear and motives generally altruistic, while judges may be motivated by political, careerist or stereotyping motives.

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[171] Submission of Mubin Shaikh, 'Shariah Tribunals and Msjid El Noor: A Canadian Model' (August 24, 2004).

- Mediators can appeal to common values, beliefs and principles, while judges generally cannot.

Many of the Muslims who responded to the Review, talked about how severely stressed their community has been since the terrorism attacks of 9/11 and the subsequent incidents that have arisen from security measures taken by the Canadian government. Some spoke of increased fear of discrimination against their community in the court system. Many are very aware of the criticisms raised in the Cole/Gittens Report on Systemic Racism in the Criminal Justice System[172] and made the point that similar issues of discrimination have been experienced in the civil justice system, particularly in family courts. This fear of discrimination in the mainstream society may make private arbitrations under Muslim law seem more attractive and safer, especially to younger people seeking to establish their identity as a minority within a larger community that is seen as hostile. The submission from Moulana Habeeb, Director of United Muslims expresses some of the defensiveness felt by Muslims given the portrayal of the dangers of religiously based arbitration:

> The fear of women being treated unequal is more of an unstudied phobia more than the educated position. Does equal mean sameness? Is separated washrooms inequality? Could we claim a shut down to law and order when women continue to be abused and innocent people are apologized to for serving sentences in non Islamic societies? Rather we should become the gateways to solutions, as is genetic of Western societies rather than being parley to the crisis. While the Quaran is vast in its interpretations, none can disclaim the universal principles it compels in civil laws. About divorce it instructs the husbands: "Then keep them in all decency or part them decently. It is not lawful to take anything you have given them." Whatever school of thought a person follows then Arbitration procedures must allow him the choice of his schools' scholar. Only then justice would have been served. Similarly women must be seated in the panel as the classical jurist Abu Hanifa, has legislated the presence of women judges. Do we also object to those that opt for Muslim produced foods and clothing, schools and telecommunications as being anti Canadian? If no, then opting for one's personal matters to be settled by leaders that are mutually respected in the family, most of the times the Imam, is only a continuation of such acceptable trends. No one is reprimanded or isolated because they don't deal in interest-free banking. So too is the continued culture of having the value-added choice of Muslim Personal Law Board recourse.[173]

Another point that was raised was the difficulty of honouring community or family obligations within Ontario family law, since this regime tends to apply only to two adult persons in a relationship and any children that may arise from it. In many communities, extended families are the norm, not the exception, and other members of the family or the household may be affected by property rights which our law defines more narrowly. The Christian Legal Fellowship provided the following example:

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[172] Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, (Queen's Printer for Ontario, 1995) (Co-chairs: David Cole and Margaret Gittens).
[173] Submission of Moulana Habeeb, United Muslims (September 2, 2004).

> Suppose a married couple purchased a home and registered title only in the husband's name for liability purposes. The couple continued to reside there with the wife's parents who contributed something toward groceries and a few bills. All of the mortgage, taxes and major expenses were shared by the couple in proportion to their incomes. The couple then separated.
>
> Under Ontario law [the Family Law Act] the home would be considered a matrimonial home and could not be disposed of by the husband without the wife's consent. Any interest the wife's parents might have would not be considered. The value of the home would be shared equally by the husband and wife, to the exclusion of the parents.
>
> If the matter were mediated or arbitrated in a Christian setting, consideration would normally be given to the interests of the parents—both morally and legally. The husband and wife would have to consider where the parents would live if the home was sold, how that would be paid for, as well as the legal rights and obligations between the spouses to fairly divide their property.[174]

Similarly, some women advocating for arbitration under Muslim law, pointed out that under the *Family Law Act*, they would be held accountable for supporting a spouse and children, if they were the breadwinner of the family. According to Muslim law, if a woman contributes to the support of the family, she is doing it voluntarily and it is a blessing to her, not an obligation. Indeed, some women argued that they would be financially better off under Muslim family law than under Ontario law and believed that the use of Muslim arbitration would enable them to maintain that advantage.

All of the arguments raised earlier in this report in favour of mediating and arbitrating family law disputes earlier, were raised as well with respect to religiously based ADR. In particular, most of the religious organizations stressed the lower cost of dealing with family matters in the religious forum, since most of the proponents offer services either free or at very low cost. Most religious organizations underwrite the cost of services by using volunteer mediators or arbitrators or by raising community funding to support the services. In most cases, any charge is minimal and intended only to cover hard costs of the process itself. The timeliness with which matters can proceed was also considered a major benefit, especially in the Muslim community, where the period of time from the decision to divorce to the freedom to remarry is considerably less than that allowed by law in Canada, and much less than that required to obtain a divorce through the court system in many cases.

Most religious groups were adamant that they all be treated equally with respect to their right to provide religiously based arbitration and with respect to any new restrictions that the Review might propose. Some, however, had reservations about other groups, even while advocating on their own behalf. The Christian Legal Fellowship points out:

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[174] Submission of Christian Legal Fellowship (August 27, 2004).

> It is much more difficult to balance competing rights of religious freedom and equal treatment under the law when a religious community does not believe that all members of the community are to be treated equally (for example if women are considered less worthy.)[175]

Many of those writing independently to the Review were clear that they were only opposed to allowing Muslim family law to be used. Some of these submissions were explicitly racist in content. However, other respondents were very clear about the difficulty of allowing one form of religiously based arbitration, and not others. As Philip Epstein stated,

> I am very concerned about the introduction of Sharia law to Ontario but I also recognize that Jewish law is applied now under Jewish tribunals and one can obviously not discriminate between different racial or cultural groups.[176]

Virtually all of the respondents favouring religiously based mediation and arbitration advocated for additional safeguards to be applied where family law matters are to be arbitrated in order to prevent the kind of discrimination and inequity most feared by the opponents.

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[175] Submission of Christian Legal Fellowship (August 27, 2004).

[176] Submission of Philip Epstein (September 21, 2004).

Section 5: Constitutional Considerations

During my discussions with people from across Ontario, and as I read the letters that were addressed to me and to the Review, I was impressed and touched by the extent to which respondents relied on their understanding of the *Canadian Charter of Rights and Freedoms* (*Charter*) and its role in protecting the rights of Canadians.[177] Participants in the Review, both those with formal legal training and those with none, regardless of their position with respect to the use of arbitration for personal law matters, have clearly embraced the values expressed in the *Charter* and perceive that the *Charter* supports their perspective on the issues at hand. With some notable exceptions, few acknowledged that there are limits to the applicability of the *Charter*, and that, unless the *Charter* applies, none of its provisions can be brought to bear. Therefore, it may be helpful to outline the situations in which the *Charter* applies. Subsequently I will address some of the arguments put forward by some participants regarding *Charter* sections 15(1) and 2(a), 28 and 27. A discussion of the policy implications of the *Charter* applicability and these sections will follow.

Application of the *Charter*

Prior to determining whether a *Charter* right or freedom has been infringed by a course of action, the following question needs to be answered in the affirmative: does the *Charter* apply?

Section 32 of the *Charter* provides as follows:

> **32.** (1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of each province.[178]

Accordingly, the federal and provincial governments are bound by the *Charter*. Both Parliament and the Legislatures "have lost the power to enact laws that are inconsistent with the *Charter of Rights*."[179] As well, anything that constitutes government action, including legislation and regulation, is subject to the *Charter*. This includes action taken under the common law.[180] Given that no government can authorize actions that are contrary to the *Charter*, this has been further interpreted to mean that the *Charter* binds any decision maker who applies the law because a statute gives them the authority to do so. So, state action under statute, under the common law, and through third parties is subject to the *Charter*.

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[177] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to *The Canada Act 1982* (U.K.), 1982, c.11.

[178] *Canadian Charter of Rights and Freedoms*, s. 32. Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11.

[179] P.W. Hogg, *Constitutional Law of Canada*, (Toronto: Thomson Carswell, 2003) at 752-753.

[180] *RWDSU v. Dolphin Delivery* [1986] 2 S.C.R. 530 at 573; *Dagenais v. CBC* [1994] 3 S.C.R. 835; *Hill v Church of Scientology* [1995] 2 S.C.R. 1130.

The Supreme Court of Canada has established a test to determine whether there is a sufficient degree of government control of a public body in order for the actions of that body to constitute government action. According to this test, there must be both an institutional and a structural link between a public body and the government in order for the *Charter* to apply. Where a public service is being performed independently of government control the required link is not present and the *Charter* will not apply.[181]

A link is present where the government delegates power to a non-government actor or agency. The *Charter* applies to that delegate where the government has control over the actor or agency. For example, in a case called *Slaight Communications v. Davidson* the Supreme Court determined that an adjudicator's decision was subject to the *Charter*, because the adjudicator was appointed by the Minister of Labour.[182] Another key aspect is that the body exercising authority delegated by government must be entrusted to implement specific government policies in order for the *Charter* to apply. [183]

Conversely, institutions, such as a hospital, a university, or a corporation, which derive their existence and powers from statute, are nonetheless deemed not to be controlled by government, if decisions that guide the day-to-day operations of these organizations are not taken by government. Therefore, in spite of being public institutions, in the case of hospitals and universities, or simply being regulated by statute, in the case of corporations, these entities are not bound by the *Charter*.[184] On the other hand, as mentioned above, if the body is implementing a specific government policy, then *Charter* scrutiny will ensue.[185]

Omissions made by government may also be subject to the *Charter*. The Supreme Court has spoken on this point. In *Vriend v. Alberta*, Delwin Vriend, a gay man living in Alberta, had been fired from his teaching position on the basis of his sexual orientation. When he brought a complaint to the Alberta Human Rights Commission, he found that sexual orientation was not a listed ground upon which to base a complaint in the *Alberta Human Rights Code*, and that he was without recourse against his employer under that statute. The effect of the Supreme Court ruling was that such an omission taking place in the context of government action may be construed as a deliberate choice to exclude and that that choice amounts to an action. As a result the *Charter* applied to the situation created by the omission in the statute and the Court remedied this omission by "reading in" the ground of sexual orientation in s.15.[186]

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[181] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229; *Stoffman v. Vancouver General Hospital* [1990] 3 S.C.R. 483.

[182] *Slaight Communications v. Davidson* [1989] 1 S.C.R. 1038 at 1077; Joseph Eliot Magnet, *Constitutional Law of Canada: cases, notes and materials*, 8th ed. vol. 2 (Edmonton: Juriliber, 2001) at 20.

[183] *Eldridge v. British Columbia (A.G.)* [1997] 3 S.C.R. 624.

[184] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229; *Stoffman v. Vancouver General Hospital* [1990] 3 S.C.R. 483; *Lavigne v. OPSEU* [1991] 2 S.C.R. 211.

[185] *Eldridge v. British Columbia (A.G.)* [1997] 3 S.C.R. 624.

Section 32 of the *Charter* states both the scope and the limit of *Charter* applicability. The *Charter* does not govern relations between private parties. During the Review, the argument was put forward that where the government regulates, the *Charter* must apply; that is, regulation alone constitutes sufficient government involvement automatically to render actions carried out under the legislation public in nature. It is true that government does regulate much of what may be considered "private" action, if we understand "private" action to mean the relationships between non-governmental parties, such as persons, or corporations. Government regulation must comply with the *Charter* on its face; however, unless the action taken under the statute constitutes government action, the *Charter* will not apply.

Some commentators suggested that the government would be carrying out public action where a court enforces an arbitration award made by a privately appointed arbitrator, thereby introducing an element of ambiguity with respect to application of the *Charter* to arbitrations in Ontario. There are no court decisions on this issue, and it is not clear whether a court would find the necessary link between government and a privately appointed arbitrator. Further, while a court might find that a privately appointed arbitrator resolving a private dispute was enforcing a government action, such a finding has not yet been made.

Some participants have also asserted that section 15(1) of the *Charter* is engaged by the arbitration of family law and inheritance, because of the subject matter being treated. Section 15(1) reads as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[187]

Other commentators have suggested that section 2(a) of the *Charter*, guaranteeing freedom of religion, comes into play with respect to arbitration of family law and inheritance matters under religious principles. According to some respondents, s.2(a) acts to guarantee the right to arbitrate according to the religious principles of choice of the parties to the dispute. Conversely, other participants foresaw a potential limitation on the freedom of religion of individuals seeking arbitration, if the particular form of religious law used by the arbitrator includes strictures with which the parties were not in agreement.

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[186] *Vriend v. Alberta* [1998] 1 S.C.R. 493.

[187] *Canadian Charter of Rights and Freedoms*, s. 2(a). Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982, c.11; Vriend v. Alberta* [1998] 1 S.C.R. 493.
As noted above, sexual orientation was read into s.15 as an analogous ground by the Supreme Court in 1998 in the case of *Vriend v. Alberta*. This Section requires that government legislation must apply equally to all citizens regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, or sexual orientation.

Section 27 was frequently cited by respondents who argued that the requirement not only to permit but to "enhance" the capacity of multicultural communities demands that communities be allowed to use their own form of personal law to resolve disputes. Section 28 was seen by others as an over-riding requirement to ensure that women's equality rights are guaranteed when family and inheritance issues are being determined.

As we have seen, there are a limited number of categories of action in which the *Charter* applies. First, there is government action under a statute. Second, there is government action under the common law. Third, there is government action through a third party who is empowered by government to act. Fourth, there is government omission in the context of government action.

Agreeing to be bound by an arbitrator's decision falls into the category of an action that is private and therefore, in my view, is not subject to *Charter* scrutiny. The action is private because it is a reflection of the parties' relationship and because the authority of the arbitrator flows directly from the parties' agreement to be bound. Arbitrators do not derive their authority from the government through the *Arbitration Act*.

In addition, arbitration is a private action because there is no state compulsion to arbitrate. The existence of the *Arbitration Act* does not force people to arbitrate. One common misconception on the subject of arbitration of family and inheritance matters that I heard during the Review was that the existence of the IICJ, or any other Islamic arbitration service provider, in and of itself, creates a legal obligation for all Muslims in Ontario to avail themselves of these services. This erroneous interpretation may have developed because of the way the service was presented by the IICJ. However, Muslims in Ontario retain, as do all Ontarians, the right to choose the traditional justice system or any alternate to it for the resolution of their disputes. If they choose not to avail themselves of the services of an arbitrator who applies Islamic legal principles, the law does not compel them to do so. An arbitrator's authority simply comes from the consent of the parties, and no exercise of statutory power is involved.[188] In addition, the presence of legislation does not mean that government action is involved to the extent necessary to merit the application of the *Charter*.

The issue is ascertaining at which point the "public" / "private" divide arises. I recognize that the public/private discourse has resonance for feminist legal scholars. However, where people create legal relationships between themselves on their own authority, as legally capable individuals, it seems that a private legal relationship has arisen. Although government has a role in ensuring that the law that applies to the breakdown of that private relationship does not perpetuate gender roles and stereotypes, if the participants choose not to follow that law, and instead make private arrangements, the government is not required to interfere. As a result, in my view, arbitrations of family law and inheritance matters do not fall into any of the categories of government action that may engage the application of the *Charter*.

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[188] P.W. Hogg, *Constitutional Law of Canada*, (Toronto: Thompson Carswell, 2003) at 754.

Some have argued that the *Arbitration Act* offends the *Charter* by not explicitly protecting women, in particular, as well as other vulnerable people, in its provisions. Underpinning this argument is the idea that what the *Charter* requires from a statute is equality of result, and not equality of application of the statute itself. From this perspective, the absence of *Charter* protection constitutes an omission on the part of government. Yet the *Arbitration Act* does not differentiate on any prohibited ground, indeed does not differentiate on any ground whatsoever, except legal incapacity.[189] Therefore no omission exists on which to argue that a particular group of people is being excluded from consideration. In the *Arbitration Act*, no one is named and everyone is given the same rights and protections.

People who have vulnerabilities of all kinds make private contractual arrangements, with or without arbitrators, which are not subject to *Charter* scrutiny. Even though arbitration of family law and inheritance matters may have the potential to affect women in particular, arbitrations remain private agreements about personal disputes.

It is true that the courts may exercise the power of the state in making orders to enforce arbitration decisions, and the power of the state is to be exercised in conformity with the rules of the *Charter*. A court might hold that it has no jurisdiction to enforce an award that would violate the *Charter* rights of any party.

However, this argument presents a number of difficulties. Nothing in the *Charter* requires disputants to resolve their property disputes on a 50/50 basis or that private legal arrangements arrive at an equal result. Nothing in the *Charter* requires an equal result of private bargaining. Parties may choose an apparently unequal result for many reasons and may think a deal fair that outsiders think is unfair. Recent cases at the Supreme Court of Canada reinforce this point.[190] The *Charter* requires that the state give people equal benefit of the law, without discrimination on any prohibited ground,[191] and that all its rights apply to women and men equally.[192] At present, the law gives all parties to arbitrations, women and men alike, the same right to court enforcement of awards. There is no obvious *Charter* ground to invalidate that.

As mentioned earlier the *Charter* also guarantees people freedom of religion,[193] and is to be interpreted so as to enhance the multicultural heritage of Canadians.[194] This suggests respect for people's choices as long as those choices or the results are not illegal.

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[189] S.O. 1991, c.17, s. 10, online: < http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/91a17_e.htm>.

[190] *N.S. (AG) v. Walsh* [2002] 4 S.C.R. 325; *Miglin v. Miglin* [2003] 1 S.C.R. 303; *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550.

[191] *Canadian Charter of Rights and Freedoms*, s. 15(1), Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982, c.11*.

[192] *Canadian Charter of Rights and Freedoms*, s. 28, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982, c.11*.

[193] *Canadian Charter of Rights and Freedoms*, s. 2(a), Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982, c.11*.

Barring Muslims, or any other identifiable group in Ontario, from arbitrating family law and inheritance matters, while others continue to arbitrate according to the principles of their choice, as some commentators have suggested, would raise the issue of whether the government was in violation of the *Charter*. Given that the *Arbitration Act* provides a framework for arbitration for all Ontarians, the government should not exclude a particular group of people on the basis of a prohibited ground.

The Supreme Court of Canada addressed freedom of religion under section 2(a) of the *Charter* in the context of Sunday shop closings. In *R. v. Big M Drug Mart* freedom of religion was defined as follows:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship or practice or by teaching and dissemination.[195]

While this remains an interpretative starting point, section 2(a) requires a complex legal analysis, involving balancing competing rights, and in order fully to achieve the appropriate balance, further study may be required. In addition, freedom of religion has received little attention from our higher courts. The state of the law as it would apply to arbitrations under religious principles is therefore uncertain at best. To make definitive pronouncements on the state of the law in this area is not possible, because it has not yet been determined. The same can be said of sections 28 and 27 of the *Charter*, which are sections of an interpretative nature. There is little jurisprudence upon which to base unequivocal statements as to their precise meaning, and their definition in law remains to be authoritatively ascertained.

During the course of my Review, I heard from many people who work in the field of arbitration and who expressed grave concern about the possibility of losing the option to arbitrate family law matters. Large numbers of Ontarians use arbitration and mediation to settle family law disputes. They do so in order to avoid the high cost of litigation in courts. But they also do so in an attempt to reach agreements they feel more a part of, rather than having a settlement imposed by a court. There is some indication that these types of agreements may be respected by the parties to a somewhat greater extent than is the case with court-imposed settlements.

Understanding that not everyone will choose to resolve legal disputes in the same manner is central to seeing what is at play in this debate. As we have seen above, the *Arbitration Act* provides everyone with the same opportunity to pursue dispute resolution

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[194] *Canadian Charter of Rights and Freedoms*, s. 27, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982, c.11*.

[195] *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295 at 336.

outside of the courts. Just because we may disagree with the manner in which this alternative is used by some individuals does not mean we are allowed to deprive them of the right to use it, as long as they using it in an appropriate manner. Therefore, as long as true consent is obtained, each individual should have the right to make decisions for her or himself, even where those decisions are not those the majority of others would make.

Opponents of family law arbitration often point out that there is no way to ascertain true consent: knowing whether true consent exists is an impossibility and therefore the state should ensure that those who may be vulnerable have adequate protections. A number of assumptions underlie this argument. First is the idea that there are some categories of people who, while being legally capable, are nevertheless automatically vulnerable and therefore unable to understand how to make choices for themselves, and, especially, how to make the right choices for themselves. In this view, there is a defined correct choice. Second is the notion that there is no way someone who is fully informed of her rights and obligations would make certain choices, such as arbitration according to religious principles.

People are entitled to make choices that others may perceive not to be correct, as long as they are legally capable of making such choices and the choice is not prohibited by law. In those areas where the state has chosen to allow people to order their lives according to private values, the state has no place enforcing any particular set of values, religious or not. Picking up the theme discussed earlier about the distinction between private and public, in some ways it doesn't matter where that line is drawn. It is enough to know that it exists and to understand that, where it is drawn at any given time, will determine the area in which the state will assert its values and where it will not.

I believe that arbitrations under the *Arbitration Act* are an area where the state should refrain from preventing private parties from making contractual arrangements about a variety of disputes, including family law and inheritance. There is no question that there are serious concerns that should be addressed by strengthening protections for those identified as vulnerable through legislative, regulatory or other means. The primary purpose of the *Charter* is to mediate the relationship between the state and the individual.[196] Where the state and the individual meet, the *Charter*'s presence should be felt. This is because no institution other than the state possesses the wide array of coercive and persuasive instruments the state has at its disposal. The state can enforce its laws through the police who may, in extreme cases, deprive individuals of their liberty for resisting state legislation or regulation. However, statutory authority underpins state action, from legislation to police enforcement.

The relationship between the state and the individual is unlike the consensual legal relationship between two persons. No individual alone can legally require someone to do something they do not want to do, or punish them for failing to do that which they do not want to do. No one can legally force another to do something they do not consent to, without engaging the authority of the state. The state has a monopoly on the legal use of coercion, which it may exercise when it is permitted to do so by law, in order to enforce the law. Therefore, limits provided by *Charter* provisions represent the boundaries of state action that we, as a society, have agreed should constrain the actions of government and its institutions. Face to face with the state, the individual is the weaker party. It is the strength of the state that merits restraint in the form of *Charter* scrutiny.

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[196] Patrick Monahan, *Constitutional Law*, 2nd ed. (Irwin Law Inc., 2002) at 409.

Critics assert that the distinction that allows the private to be dissociated from the public for purposes of applying the *Charter* is artificial. Critics charge that this distinction is inherently biased against the most vulnerable in society, who cannot defend themselves within private relationships where imbalances of power are unchecked. Where these imbalances of power are reinforced by the courts' upholding contracts made by parties of unequal power, a serious problem arises.

While this is a difficulty that must be addressed, we must bear in mind that state coercion is not the same as community compulsion. Absence of state intervention, where communities exert pressure on their members to make certain decisions, does not mean the state has violated any *Charter* rights. The *Charter* places limits on the type of behaviour the state engages in. At the same time, it should limit the scope of state action. The *Charter* is not a permissive instrument that allows the state to act wherever its provisions are violated, regardless of who is responsible for the violation.

It is not clear to me that we should aspire to the level of state intrusion in our lives that is implied by the application of the *Charter* to privately ordered relationships. Of course, in any given area, the government can decide it wants to regulate for the purpose of achieving conformity of conduct in accordance with a given set of principles. However, this in no way diminishes the fact that we accept that there are private spheres in which people should be free to live as they choose without being forced to subscribe to the values of the state. Where this line is drawn is constantly in flux, its location the result of the ongoing dialogue between the government, the public, and the courts.

This is not to say that other forms of coercion do not exist. However, there are limits in the criminal law on private acts of coercion. The single exception is the law of contract. Within the law of contract we allow private individuals, such as people, corporations, and other institutions, to create private law. If this were not a legally acceptable form of relationship, then every exchange would somehow have to come under government scrutiny. Accepting this form of agreement rests on the notion that the parties entering into such an agreement are capable of making such decisions for themselves. State scrutiny of each privately ordered arrangement implies that no one is capable of making decisions on their own behalf. This is a degree of paternalism which I would find intrusive and inappropriate.

Keeping this in mind, it is a valid question to ask whether all people entering into privately ordered arrangements of their personal affairs actually possess a sufficient understanding of the rights available to them, and the obligations they must fulfill, according to Ontario and Canadian law, in order to make decisions that are right for them. However, that is a question best dealt with, not by the Constitutional law, but by the broader community as represented by the legislature. Indeed, the legislature may well decide that particular groups need protection from specific risks, as it has, for instance, by the enactment of employment standards or consumer protection laws. The *Arbitration Act* does contain protections, and, as a result of the Review, I will be recommending additional safeguards that recognize the values inherent in the *Charter of Rights and Freedoms*. Nonetheless, I do not believe the Constitution prohibits the use of arbitration, faith-based or otherwise, for resolving disputes about family law and inheritance.

Section 6: Analysis

Brief Historical Outline of Personal Law

When the issue of using another form of "personal law" under the authority of the *Arbitration Act* first arose, many of those most concerned with the concept had little knowledge of the history of religiously based personal law as it has occurred across the world in the past or as it exists today. Many commentators claimed that the possibility of using Muslim personal law, in particular, was unheard–of elsewhere and warned that Ontario was allowing a practice found nowhere else in the world, setting a dangerous precedent for other jurisdictions. In fact, the use of religious or traditional laws with respect to family law matters was more the rule than the exception in previous centuries and continues to be prevalent throughout much of the world in one form or another today.

Historical research has shown that it was the normal practice, from ancient times through the post-colonial era of the last century, for peoples, whether conquerors or the conquered, to continue to live under "personal laws," based usually on a combination of custom, tradition and religion that defined them as a people. The application of personal laws can be traced back to the most ancient times. Contracts, including marriages, successions, and extra-contractual liability (torts) were all subject to personal law. "Similarly questions of procedure, both civil and criminal, were settled according to the principle that every person has the right to be judged according to his own law."[197]

Initially differences in custom, names, culture and even external appearance were sufficient to distinguish one group from another. As intermingling of peoples occurred, individuals were required to make a declaration of which law they were entitled or chose to use to resolve a legal transaction or dispute. This was particularly true with respect to family matters, given the centrality of group identity in times characterized by waves of conquest by different peoples accustomed to different rules.

Through the Middle Ages, the canon law of the Catholic Church, which applied beyond ecclesiastical matters, grew alongside the civil law, which was based on Roman law with some Germanic elements. These two systems dominated continental Europe for centuries.[198] Between the tenth century and the Reformation, canon and civil law exercised complete jurisdiction over matters of personal law in Europe.

The Reformation broke the Roman Catholic Church's domination of Europe. As a result, Protestant jurisdictions came to coexist with Catholic ones. The gradual emergence of the nation state eventually led to the creation of laws for civil matters. The result of these developments was "a progressive generalization of the law regarded as the law of the State, and a gradual reduction, if not complete abolition, of the jurisdiction of the ecclesiastical courts."[199]

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[197] Eduardo Vitta, 'The Conflict of Personal Laws' (1970) 2 Israel Law Review 170 at 172.
[198] Eduardo Vitta, 'The Conflict of Personal Laws' (1970) 2 Israel Law Review 170 at 184.
[199] Eduardo Vitta, 'The Conflict of Personal Laws' (1970) 2 Israel Law Review 170 at 184.

However, marriage laws continued for some time to be the purview of ecclesiastical courts. In Britain, for example, marriage and divorce were not regulated by the state until 1857, so that religious laws (Anglican, canon and rabbinical) applied to the members of these faiths with respect to family law. "Of the conflicting sovereignty in this field, therefore, it is the State rather than the Church that is the newcomer."[200]

Religious control over personal law was also common in some non-western regimes. The Ottoman Empire is often looked to as the model for allowing religious pluralism within a single state and accommodating the personal laws of many different religions. The Turks, having adopted Islam, were subject in all their legal relationships between themselves to the norms of Muslim law. However, the Sultans allowed Christians and Jews to be subject to their own form of law and the heads of the Jewish and Christian communities were empowered to exercise jurisdiction over their communities within the Ottoman Empire.[201] Religious accommodation persisted throughout the Ottoman rule and was confirmed a number of times during the nineteenth century by the Sultans and various European rulers who were anxious to ensure their non-Muslim citizens were not judged under Muslim laws.

As European colonization expanded over much of Asia, Africa and North America, each colonizing power brought its own legal tradition with it, often imposing their laws on the colonized. Both the British and the French tended to allow the use of personal law in colonized areas as a way to deflect the aspirations of different "nations" and buy peace in their far flung empires.

> Native institutions concerning the family were generally respected. It was accepted that these institutions comprised not only marriage and divorce, minority, relationships between parents and children, guardianship, the status of women, etc., but also patrimonial relationships between husband and wife and succession. Native laws relating to ownership, and in a lesser degree relating to obligations and contracts, were left in force.[202]

In Canada, however, at least as early as Confederation (1867), scant respect was paid to the rich culture of aboriginal people by the colonisers. Nonetheless, the historical context clarifies why Britain tolerated the use of the French civil law in Quebec after defeating the French and why that system of law was continued in our Constitution. Indeed, Canada is a delicate balancing act where protection of the religious, language and legal rights of both French and English have marked our ethos from the beginning.

Many of those immigrating to Canada from around the world come from countries where personal laws, based on religion and custom, were accommodated by the colonisers and where, through the nation-building of the last century, these laws were retained at least in part by post-colonial independent states. Even where uniform civil law codes are established, religious groups continue to retain some control over family law matters. In particular, Muslim and Jewish laws continue to be available to govern the personal interactions of those religious groups in many of the former colonies.[203]

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[200] Carol Weisbrod, 'Family, Church and State: An Essay on Constitutionalism and Religious Authority' (1988) 26:4 Journal of Family Law 741 at 744.

[201] Eduardo Vitta, 'The Conflict of Personal Laws' (1970) 2 Israel Law Review 170 at 173.

[202] Eduardo Vitta, 'The Conflict of Personal Laws' (1970) 2 Israel Law Review 170 at 179.

I think it important that we look briefly at the current situation in three countries, the United Kingdom, France and Germany, since many of the opponents of religiously-based arbitration have referred to these jurisdictions in their submissions. In all three countries, the Muslim population has grown significantly in the last two decades; as a result, tensions over religious rights and status have emerged.

In Britain, "Muslims have come to form the largest minority faith community."[204] For decades the Muslim community has sought to apply Muslim family laws. Through the 1970s into the 1990s demands for the official recognition of a separate Sharia system for family law for British Muslims emanated from the Muslim community in that country.

> During the 1970's, the *Union of Muslim Organisations of UK* held a number of meetings which culminated in a formal resolution to seek official recognition of a separate system of Muslim family law, which would automatically be applicable to British Muslims. In 1984, a Muslim charter was produced which demanded that the *Shari'a* should be given a place in personal law. A proposal along these lines was subsequently submitted to various government ministers with a view to having it placed before the Parliament for enactment. The demand was reiterated publicly in 1996.
>
> However, this campaign to establish a Muslim personal law system regulating autonomously personal and family related issues was rejected by the government on the basis that non-secular legal systems could not be trusted to uphold universally accepted human rights values, especially in relation to women.[205]

Having been refused a separate legal system, the Muslim community proceeded to develop an alternate dispute resolution mechanism to deal with Muslim family matters.

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[203] It is not possible in this Review to provide a detailed outline of the different accommodations reached throughout the world. However, for those interested, the comparative study of Muslim personal laws published by Women Living Under Muslim Law provides an excellent source of information. See: Women Living Under Muslim Laws, *Knowing Our Rights: Women, family, laws and customs in the Muslim World* (London: Women Living Under Muslim Laws, 2003).

[204] Submission of the Canadian Council of Muslim Women, Sharia/Muslim Law Project, 'Applicability of Sharia/Muslim Law in Western Liberal States' by Pascale Fournier (September 11, 2004).

[205] Submission of the Canadian Council of Muslim Women, Sharia/Muslim Law Project, 'Applicability of Sharia/Muslim Law in Western Liberal States' by Pascale Fournier (September 11, 2004). Fournier cites a number of relevant sources: Tariq Modood, (1993) 19:3 'Muslim Views on Religious Identity and Racial Equality' New Community 513-519; Danie`le Joly, *Britannia's Crescent: Making a Place for Muslims in British Society* (Aldershot: Avebury, 1995); Ihsan Ylmaz, *Dynamic Legal Pluralism and the Reconstruction of Unofficial Muslim Laws in England, Turkey and Pakistan* (London: School of Oriental and African Studies, 1999) at Chapter 6; Poulter, 'The Claim to Separate Islamic System of Personal law for British Muslims' in Chibli Mallat et al, eds., *Islamic Family Law* (London: Dordrecht and Boston, 1990) 147.

> In fact, the *Islamic Shari'a Council (UK) (ISC)* provides since 1982 professional conciliation services to couples on various aspects of Islamic law and has established for this purpose standard procedures, forms and certificates. It deals with more than 50 cases a year and is particularly active in resolving disputes over the enforcement of Mahr. This "unofficial law" method is quite prevalent, as a survey conducted in 1989 showed that in case of conflict between Muslim law and English law, 66% of Muslims would follow the former. One of the objectives of the ISC is "establishing a bench to operate as court of Islamic *Shari'ah* and to make decisions on matters of Muslim family law referred to it." The ISC applies Islamic rules to deal with 'the problems facing Muslim families as a result of obtaining judgements in their favour from non-Islamic courts in the country, but not having the sanction of the Islamic *Shari'ah*.'[206]

As a result, "research has shown that many important disputes among them never come before the official courts."[207] Rather, Muslims choose to follow an informal process which leaves them without protection from British Laws.

> Ethnic minorities have understandably responded to the lack of appreciation of their customs by closing in on themselves and operating outside the traditional legal system. Assisted by the gradual development of organized networks of community and communications structures, focused around religious and community centres, ethnic minority groups have evolved self-regulatory obligation systems which are applicable and understandable to themselves. Senior members of the community or religious leaders are sometimes brought in to manage these obligations and regulatory procedures but there is also much informality and a search for 'righteousness' on a case-by-case basis. Over time, this process has resulted in the organic development of customs and specific personal laws of ethnic minorities in Britain, which may avoid official channels and the official legal processes. This can be seen in areas such as marriage, divorce, dowry, gift-giving, parental discipline, transfer of property and child care. Though customary arbitration procedures may not fit in with western legal system, their decisions are generally honoured and implemented through a mix of sanctions and ostracism.[208]

In France, the secular national law applies to all French citizens without regard for religious laws. France, since the Revolution of 1789, has developed an assimilation model of citizenship and allows no law, other than its secular state law, to apply to citizens. This model of citizenship is grounded in two pieces of legislation. The first is the *Constitution of October 4, 1958*, article one, which states that, "[l]a France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances."[209] The second relevant piece of legislation is the *Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État*. Article 2 of that law states that, "[l]a République ne reconnaît, ne salarie ni ne subventionne aucun culte."[210] As a result, "France does not allow the State to officially support any exemption for or special representation of immigrant or national minorities. Consequently, strategies are employed for individual integration into the French state, while the formation of 'communities' of immigrants is highly discouraged."[211]

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[206] Submission of the Canadian Council of Muslim Women, Sharia/Muslim Law Project, 'Applicability of Sharia/Muslim Law in Western Liberal States' by Pascale Fournier (September 11, 2004). Fournier cites the Islamic Shari'a Council (ISC), *The Islamic Shari'a Council: An Introduction* (London: Islamic Shari'a Council, 1995).

[207] Submission of Anne Saris, McGill University, 'Muslim Alternative Dispute Resolution and Neo-Ijtihad in England' by Ihsan Yilmaz (September 16, 2004).

[208] Richard Jones and Welhengam Gnanpala, *Ethnic Minorities in English Law* (Stoke on Trent: Trentham Books, 2000) at 103-104 quoted in submission of Anne Saris, McGill University, 'Muslim Alternative Dispute Resolution and Neo-Ijtihad in England' by Ihsan Yilmaz (September 16, 2004).

While these laws would seem to suggest that there is no application of Muslim law in France this would be a mistaken impression. Muslims, who comprise the second largest religious group in France, after Roman Catholics, are not subject to French family law unless they have obtained French citizenship; of the four million Muslims in France, only one million have become citizens. In some cases, as a result of bilateral agreements between France and other countries, France applies the laws of a foreign resident's country of origin. However, this is done within the bounds of French law and public order, and in keeping with France's obligations under international conventions. "Hence, faced with matters of private law involving Muslims who are living in France under the citizenship of a Muslim state, French judges have had to decide upon the legality of institutions such as Islamic marriages and polygamy, the dowry (*Mahr)* and the *talaq* divorce."[212] Thus French judges hear the cases of Muslim non-citizens and are required to interpret and apply the law that is applicable to them in the country of which they are citizens.

In Germany the concept of citizenship developed differently than in France and is rooted in the notion of the common blood of the *Volk* (race), and assimilation of different races, cultures and religions has been strongly resisted until recent times. Until 1999, a citizenship applicant had to provide evidence of at least one German ancestor to receive German citizenship. This requirement effectively excluded immigrants from citizenship. Since 1999, however, restrictive citizenship and naturalization laws have undergone some changes.[213] Now children born in Germany are granted dual citizenship in Germany and their parent's country of origin; however, between the ages of eighteen and twenty-three, these children must renounce their parent's citizenship in order to retain German citizenship.

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[209] La Constitution du 4 octobre 1958 Art. 1, online: < http://www.conseil-constitutionnel.fr/textes/constit.htm#Preambule>. Translation: France is an indivisible, secular, democratic, and social republic. It ensures the equality of all citizens before the law without distinction based on origin, race, or religion. It respects all beliefs.

[210] Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État, Art. 2, online : <http://www.assemblee-nat.fr/histoire/eglise-etat/sommaire.asp#loi>. Translation: The Republic does not recognize, employ under, or subsidise any faith.

[211] Submission of the Canadian Council of Muslim Women, Sharia/Muslim Law Project, 'Applicability of Sharia/Muslim Law in Western Liberal States' by Pascale Fournier (September 11, 2004).

[212] Submission of the Canadian Council of Muslim Women, Sharia/Muslim Law Project, 'Applicability of Sharia/Muslim Law in Western Liberal States' by Pascale Fournier (September 11, 2004).

[213] Submission of the Canadian Council of Muslim Women, Sharia/Muslim Law Project, 'Applicability of Sharia/Muslim Law in Western Liberal States' by Pascale Fournier (September 11, 2004).

There are more than three million Muslims in Germany, mainly of Turkish descent. Since the early 1970's, Muslims have sought recognition as a public-law corporation, a status that accords official recognition as an equal religion under the law. Successive applications have been rejected, supposedly on the grounds that the Islamic community has not proven its duration and stability as required by the law. The Jewish community is the only non-Christian community that has achieved this status in Germany.[214]

As in France, the citizenship of the party to a dispute determines what family law will apply if that party is not a German citizen, although "this general principle is, of course, subject to German public order and to any international conventions to which Germany is a party."[215]

> These rules are of significant importance considering that about 8.9% of the population in Germany is made of non-citizens, including about 2 million originating from Muslim countries. The existence of these international private law rules incorporating *Sharia* law at a domestic level to non-German citizens is often unknown to the Muslim community.[216]

This lack of knowledge can have devastating effects when marriages break down, particularly since people may not be aware that the laws of their country of origin apply to them on German soil, regardless of how long they have resided there. The inaccessibility of German citizenship has made immigrants to Germany "guests" in their own home, and as a result, German courts have had to deal with the interpretation and application of foreign laws, including Sharia.[217]

Fournier analyses how French and German courts have applied family law with respect to Muslim parties who are not citizens of their states:

> French and German courts seem to have reached similar conclusions when clarifying the limits of French or German "public order:" religious Islamic marriages have no enforceable legal effect if the wedding took place on French or German soil; the unilateral repudiation of a Muslim wife by her husband by the *talaq* is not recognized as a legitimate form of divorce; polygamous marriages

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[214] Submission of the Canadian Council of Muslim Women, Sharia/Muslim Law Project, 'Applicability of Sharia/Muslim Law in Western Liberal States' by Pascale Fournier (September 11, 2004).

[215] Submission of the Canadian Council of Muslim Women, Sharia/Muslim Law Project, 'Applicability of Sharia/Muslim Law in Western Liberal States' by Pascale Fournier (September 11, 2004).

[216] Submission of the Canadian Council of Muslim Women, Sharia/Muslim Law Project, 'Applicability of Sharia/Muslim Law in Western Liberal States' by Pascale Fournier (September 11, 2004).

[217] Chris Jones-Pauly, 'Marriage Contracts of Muslims in the Diaspora: Problems in the Recognition of Mahr Contracts in German Law' in F. Vogel, ed. *Marriage Contracts in Islamic Law* (Harvard University Press, 2004) quoted in submission of the Canadian Council of Muslim Women, Sharia/Muslim Law Project, 'Applicability of Sharia/Muslim Law in Western Liberal States' by Pascale Fournier (September 11, 2004).

> are legally valid only if concluded in a country that permits polygamy; and the Islamic institution of *Mahr* is enforceable through French or German courts.[218]

Hence, it is clear that the application of religiously-based personal law to resolve family law matters is very widely available in both informal and formal ways in many countries. Although the emphasis in this brief history has been on Muslim personal law, similar accommodation for Jewish law has been allowed in many parts of the world as well.

Separation of Church and State

As noted earlier in Section 4, many respondents were adamant about the need to separate religion from the state. They saw the use of religiously-based arbitration as crossing the line between the two.

> The chief problem with the distinction between the secular and the religious is knowing where to draw the line. In part, this results from the fact that different religious worldviews contain different conceptions of the content of the sacred and the secular, and of the boundary line between them. At the extreme, some religions draw no such distinction at all. According to such holistic religions, religion is not confined to activities such as prayer and church attendance; nor does it consist primarily in the conscience of the believer. Rather, it suffuses an entire way of life (thus obliterating the distinction between religion and culture.)[219]

The Review heard from many respondents that Islam falls into the latter category of a holistic religion that makes no distinction between religion and the state. Syed Mumtaz Ali's articles, posted on the website http://muslim-canada.org, are selectively quoted in a submission from Elka Enola, a secular humanist opposed to the use of religiously-based personal law:

> It is well known that Islam provides a complete system for regulating every aspect of human life. The rules, obligations, injunctions and prohibitions laid down by or derived from the Qur'an and the Sunnah produce a complete picture of the Muslim community, from which no part can be removed without the rest being damaged.
>
> Islam does not believe in the principle of separation of the spiritual and the temporal, the sacred and the profane nor the church and the state.
>
> Islam makes no distinction between private and public morality. The Islamic concept of **PERSONAL FREEDOM** is the complete opposite of contemporary western thought. According to Islam, personal freedom is available and

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[218] Submission of the Canadian Council of Muslim Women, Sharia/Muslim Law Project, 'Applicability of Sharia/Muslim Law in Western Liberal States' by Pascale Fournier (September 11, 2004).

[219] Nomi Maya Stolzenberg, 'A Tale of Two Villages' in Ian Shapiro and Will Kymlicka eds., *Ethnicity and Group Rights* (New York: New York University Press, 1997).

> permissible only in respect to matters which are **NOT REGULATED** by the injunctions and prohibitions laid down by the Qur'an and the Sunna, for these are expressions of the inherent Divine Wisdom manifested through the Divine Will.[220]

In one analysis of the relationship between religion and the state in Muslim countries, Lisa Hajjar categorizes the different models currently in place today. The first category may be called "communalization" where members of different religious communities are subject to separate system of personal status laws, essentially creating two tiers of law. Hajjar suggests that Israel, India and Nigeria are in this category. The second category is "nationalization." According to Hajjar, "any state that identifies Islam as the official religion and draws on religious law and jurisprudence to shape national legislation and policies, but does not derive or base its own authority on *shari'a*, would fall within this category. This includes much of the Arab world and some countries in Africa and Asia with Muslim majorities."[221] The third category is "theocratization."

> In countries where the state defines itself as Islamic, religious law *is* the law of the state. In such contexts, defense of religion can be conflated with defense of the state, and critiques or challenges can be regarded and treated as heresy or apostasy, which the state authorizes itself to punish. Iran and Pakistan are examples of theocratization.[222]

In contrast, France provides an example of a state that has attempted to completely separate church and state, at least with respect to its own citizens, as noted in the previous sub-section.

> The most important feature of current French politics is its neo-republican discourse on French identity, in which membership in the national community involves an absolute commitment to the Republic and to its core values of *égalité* (equality) and *laïcité* (the separation of state and religion.) This republican model was forged in the context of the 1789 French Revolution as a direct reaction to the historical French struggle against its own Monarchy, ruling aristocracy and religious establishment.[223]

> This commitment to secularism is so crucial that France entered a reservation with the Secretary General of the United Nations with respect to Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR), which reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the

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[220] Submission of Elka Enola, 'A Canadian Objection to Shari'a Under the Arbitration Act' (April 2004).

[221] Lisa Hajjar, 'Religion, State Power, and Domestic violence in Muslim Societies: A Framework for Comparative Analysis' [unpublished] submitted by the Canadian Council of Muslim Women (2004).

[222] Lisa Hajjar, 'Religion, State Power, and Domestic violence in Muslim Societies: A Framework for Comparative Analysis' [unpublished] submitted by the Canadian Council of Muslim Women (2004).

[223] Submission of the Canadian Council of Muslim Women, Sharia/Muslim Law Project, 'Applicability of Sharia/Muslim Law in Western Liberal States' by Pascale Fournier (September 11, 2004).

> other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." [224]

Because of the growing number of Muslims living in France, the government initiated a wide consultation in 1999 which culminated in a formal declaration which was ratified by the Muslim community. The purpose of the declaration was to establish a mechanism to allow Muslims to have religious rights but still honour the principle of *laïcité*. The French Council of the Muslim Religion was established in May 2003; this body consists of a General Assembly, a Board of Directors and an administration. Under the national Council are 25 Regional Councils. This body, similar to those allowed for other religions in France, are responsible for working with local governments on such issues as the establishment of mosques, the regulation of ritual slaughter, the appointment of chaplains, and other matters. However, the autonomy of the Muslim community is strictly limited. For example, Muslims are still required to obey the edict not to display religious signs of membership; this has led to much controversy in recent months.[225]

Britain has no tradition of the separation of church and state. Indeed, since the establishment of the Church of England during the early sixteenth century, the monarch has been the Supreme Governor of the Church of England as well as the head of state. Although Britain is home to many different religions, there is no mechanism by which religions are acknowledged or given specific powers. Since the first *Marriage Act* of 1857, there has been a gradual transfer of family law matters from the church to the state so that a secular and universal system of family law prevails. As noted in the sub-section above, there is no official recognition of privately arbitrated disputes settled by religiously-based dispute resolution mechanisms, even though these means of resolving family matters are increasingly used by Muslims, as the community grows and matures.[226]

Canada, too, has never had strong policies or legislation to define a separation of church and state. During the colonial period, many land grants were made to various religions and communities often built up around the church; the clergy had a great deal of influence over the development of education and social services at a local level; only gradually over time were these services seen to be the responsibility of the provincial government, which could ensure their availability to all citizens. Although the religious rights of Catholics to control the education of their children are protected by the Constitution, there is no state religion. Section 2 of the Constitution guarantees

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[224] International Covenant on Civil and Political Rights, 10 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) quoted in the submission of the Canadian Council of Muslim Women, Sharia/Muslim Law Project, 'Applicability of Sharia/Muslim Law in Western Liberal States' by Pascale Fournier (September 11, 2004).

[225] See Marcus Gee, 'Secular France, uncovered' *The Globe and Mail* (19 Dec 2003) A2;
'More than 100 girls defy France's headscarf ban' CBC News Online, online:
<http://www.cbc.ca/story/world/national/2004/09/08/headscarves040908.html>;
'First girls expelled over French headscarf ban' CBC News Online, online:
<http://www.cbc.ca/stories/2004/10/20/world/france_headscarves041020>.

[226] Submission of the Canadian Council of Muslim Women, Sharia/Muslim Law Project, 'Applicability of Sharia/Muslim Law in Western Liberal States' by Pascale Fournier (September 11, 2004).

Canadians freedom to practice the religion of their choice and Section 27 provides for the maintenance and enhancement of multiculturalism in the country. Many respondents, as noted in Section 4 of the Report, see the ability to arbitrate family matters in religiously based tribunals as one manifestation of their rights under the Constitution and as an example of how religious and legislated laws can complement one another. As pointed out in one submission to the Review,

> Hassidic Jews, Catholics and Ismailis have used their religious doctrine to settle disputes for a decade without a hue and cry about threats to the secular state. Secularism, as practiced in Canada, requires that the state remain neutral between religions and not promote a single faith at the expense of other faith groups. Secular law can accommodate (and has been accommodating) law inspired by religious doctrine for decades. Secular and religious law aim for the same goal: justice. Hence the tribunals offer a way for these two bodies of law to work in tandem. Those with religious beliefs will feel deeply satisfied with civil disputes settled according to their religious doctrine, in accordance with Canadian law, in a way they will not feel with law settled only according to secular courts. The secular courts cannot offer the psychic satisfaction that springs from religious belief.[227]

Political Identity

A difficult aspect of the debate surrounding the use of religious principles in family law arbitration, at least as it pertains to parts of the Muslim community, is the assertion of political identity claims that reach beyond accepted norms of cultural and religious distinction and autonomy in Ontario. Such claims stand at the core of the justifications used by some respondents to buttress their claim to a right to arbitrate according to Muslim personal law. In some cases, problematic and unjustifiable comparisons were drawn between the political autonomy afforded Canada's First Nations and the Muslim community in order to justify demands for increased legal and political autonomy.

On this point, it must be noted that Aboriginal people, unlike any other group in Canada, have rights that are specifically recognized in Canada's *Constitution Act, 1982*. These rights stem from the historical, legal relationship between different First Nations, the original inhabitants of this land, and the Canadian state, often achieved through treaties signed by both as sovereign nations. This position is not comparable to any other relationship or obligation the Canadian state has with any other groups, or any other individuals. The unique status of aboriginal people is reflected in other pieces of legislation, such as the federal *Employment Equity Act*, which defines visible minorities as, "persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour" (emphasis added).[228] To compare any group of people, whether they are distinct on a cultural, ethnic or religious basis, to the First Nations of Canada in this country's legal and historical context reveals a misunderstanding of the nature of the relationship between the Canadian state and the First Nations. From my perspective, comparisons in this direction are erroneous at best.

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[227] Submission of Islamic Society of North America, 'ISNA Canada Position Statement: Muslim Tribunals in Ontario' (Undated).

[228] *Employment Equity Act*, 1995, S.C., c. 44, s. 3.

Some participants openly advocate a separate legal regime to govern the lives of Canadian Muslims, as distinct from the rest of Canadians, with the goal of political autonomy for the Muslim community in this country. While this may the real desire of some, others, both within and outside of the Muslim community, claim that this sentiment is fomented by foreign interests pursing a reactionary Islamic agenda in Canada.[229] There is certainly evidence to show that in many Western democracies some mosques and Muslim community centres, which espouse and propound extremist views, are funded by foreign sources, and there is no reason to think that Canada would be an exception.[230] The role of these mosques and community centres is to advocate for varying degrees of segregation – social, legal, and political – of the Muslim community from the mainstream, clearly a position that is not supported by all members of the community, and is actively opposed by others.[231]

Regardless, under the current legal structure, establishing a separate legal regime for Muslims in Ontario is not possible. Creating a separate legal stream for Muslims would require change to our justice system on a level not easily contemplated from a practical, social, legal or political point of view. In addition, it must be clearly understood that arbitration is not a parallel system, but a method of alternative dispute resolution that is subject to judicial oversight, and is thus subordinate to the court system. Assertions that arbitration actually provides a system of justice running alongside the traditional court system are misleading and unfounded. Nor would it be at all advisable to encourage the creation of such a system.

Ontarians do not subscribe to the notion of "separate but equal" when it comes to the laws that apply to us. The notion of a separate legal regime for Muslims in Ontario or in Canada would therefore be unlikely to find much acceptance in the broader Ontario community. A policy of compelling people to submit to different legal regimes on the basis of religion or culture would be counter to *Charter* values, values which Ontarians hold dear, and which the government is bound to follow. Equality before and under the law, and the existence of a single legal regime available to all Ontarians are the cornerstones of our liberal democratic society. Indeed "[t]he importance of equality as a social, legal, and political value in Canadian society has been acknowledged in many ways since Confederation."[232]

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[229] See Syed Mumtaz Ali and Rabia Mills, 'The beginnings of Muslim Civil Justice System in Canada' online: < http://muslim-canada.org/DARLQADAform2andhalf.html>.

[230] For more on this topic, see Gilles Kepel, *Jihad: The Trail of Political Islam* (Harvard University Press, 2002). See also Martin Rudner 'Challenge and Response: Canada's Intelligence Community and the War on Terrorism' (2004) 11:2 Canadian Foreign Policy 17.

[231] Political aims were rejected by Dar Ul Qada whose leaders specifically stated that their project was aimed at the social and spiritual aspects of dispute resolution. Submission of Wasi Mazhar Mullah (August 31, 2004); submission of B. Husain Bhayat (August 27, 2004).

[232] Patricia Hughes, 'Recognizing Substantive Equality as a Foundational Constitutional Principle' (1999) 22:2 Dal. L.J. 1 at 21.

Ontarians are open to allowing minority groups a considerable degree of cultural and religious independence, so long as harm is not perceived to be done to the larger community and its values of tolerance, accommodation and individual autonomy. In particular, Ontarians' commitment to equality as a foundational principle, both legally and politically, reflects a belief in the equal moral worth of each individual, and the consequent entitlement to equal consideration by the laws that apply to all citizens of the province.

Finally, as Canadians we have sought to organize our political and legal institutions around inclusion which takes account of difference, not exclusion based on difference. This approach lies at the heart of a policy of multiculturalism, and conflicts directly with claims of a separate political identity asserted through a separate legal system based on religious difference.

Multiculturalism

The use of religious principles in arbitrations of family law matters illustrates the fundamental role of family law in delineating who is inside and who is outside the community according to the community's own norms. Being able to police these boundaries is a basic aspect of cultural self-determination for all communities. This issue presents the basic problem of balancing the rights of minority groups against the rights of individuals as they may be exercised within in a minority. In this sense it speaks to the basic tension inherent in multiculturalism.

The merits and dangers of multiculturalism were brought up repeatedly by many commentators to the Review. Some claimed that multiculturalism includes a guaranteed right for religious minorities to arbitrate according to religious principles. In the view of others, multiculturalism risks being distorted to allow practices to take place that would ultimately trample on the rights of the individual, and would equally be "au détriment d'une maximalisation du bien du plus grand nombre."[233] Responses were thus typically framed as respecting exclusively either minority rights or individual rights.

On one hand, some commentators to the Review would refrain from providing any state protection to the rights of cultural, and more particularly religious, minorities. This position has been referred to as secular absolutism.[234] According to this view, the state must abstain from any involvement in religious matters, and religious authorities must be prohibited from having any authority whatsoever over matters that are regulated elsewhere by state law. This is the model commonly associated with France.

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[233] Pierre Magnan, 'La Justice Minoritaire et le Mensonge du Plus Froid des Monstres Froids: Perspectives Libérales sur la Reconnaissance des Droits Minoritaires' (2000) 25 Queen's L. J. 549 at 551.
Translation: "At the expense of the good of the greatest number of people."

[234] Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001) at 73.

The secular absolutist approach is based on the assumption that secular laws treat everyone equally. A primary shortcoming of the secular absolutist position is that it fails to acknowledge that some people live their lives in a manner more closely aligned to their faiths than others, so that the secularism is experienced as a constraint. This sense of constraint applies equally to people of all religious faiths.

Ontario laws are framed by the combined influence of the Judeo-Christian and the enlightenment traditions' focus on the individual, as well as a grounding in the English common law. As a result, the laws of the province and their application are more easily digestible by some cultures than others, making their impact disproportionate on those who do not belong to the dominant culture. This disproportionate impact may serve to alienate from the mainstream those who do not see themselves reflected in our laws.

A related disadvantage of the secular absolutist approach is that, in the Canadian context, it would cut off access to a mode of legal self-expression that is currently available, and that may provide meaning to some basic legal interactions. Allowing and supporting communities' and individuals' links to cultures (including their religions) of origin is a central aspect of multiculturalism. Links to a familiar and historical cultural context provides us with points of reference according to which we can make sense of ourselves and the world around us. In this way our cultures help us conceive of ourselves as coherent individuals with a sense of agency.[235] A sense of belonging to our community of origin and participation in its activities provides us with "an intelligent context of choice, and a secure sense of identity and belonging."[236] It is arguable that in Canada our identities are formed by the dialogue between our cultures of origin and the cultural influences that surround us. This will be the case whether we are newcomers to Canada or not.

At the other end of the spectrum are those who would welcome what may be called a policy of "non-intervention"; that is, an approach by government that allows minority groups to determine "internal" issues with a minimal or non-existent state presence. Such an approach to multiculturalism "conceptualizes intragroup affairs as completely 'outside' the domain of state law."[237] According to such a conception of minority rights, the Muslim community, and other communities arbitrating family law matters using religious principles, would be able to do so based on whatever internal rules they adopt and the state would have no right to intervene.

In the context of the use of religious principles in arbitration of family law matters, it must be kept in mind that, in addition to having a demarcating function in a community, family law also has a distributive role, allocating rights and obligations to the members of the community.[238] Complete delegation of power over family law to a minority group thus empowers the group not only to determine its boundaries of inclusion and exclusion, but allows those in power in a community to determine the level of enfranchisement of individuals within the group. This is extremely problematic where a community is seen by some to have little regard for the rights of certain members, such as women.

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[235] Charles Taylor, 'The Politics of Recognition' in Amy Gutman, ed., *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1994) at 38.

[236] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).

[237] Ayelet Shachar, 'Reshaping the Multicultural Model: Group Accommodation and Individual Rights', (January 1998) 8 Windsor Review of Legal and Social Issues 83 at 95.

[238] Ayelet Shachar, 'Group Identity and Women's Rights in Family law: The Perils of Multicultural Accommodation'(1998) 6:3 The Journal of Political Philosophy 285 at 300.

The non-interventionist approach "renders invisible those violations of members' basic individual rights which occur under the shield of an identity group."[239] By placing primacy on the right of the minority group to protect itself from external influences, those individuals in the minority group whose rights may be violated must bear the burden of the protection of the culture within the dominant society. As a result, individual autonomy is sacrificed for the sake of group survival.

The difficulty in excluding some people or communities on the basis of religion is compounded, where internal rules are set up that deal with issues that are addressed by an existing state legal regime available to Ontario citizens in general. As we know, in Ontario the family law regime is not mandatory – there are limited state guaranteed protections, apart from the right to avail oneself of a particular set of laws. However, it is in no way tolerable for any individual to lose legal protection because of the exercise of power by a minority group, up to the point of being barred from access to the laws of Ontario. It is therefore essential to ensure that these laws are available to all, regardless of the community they belong to, and that the community itself is not given the right to stop people from having access to those laws.

Returning to the discussion of the public/private distinction, it is for the reasons mentioned above that such a distinction is problematic, to the extent that it relates to the state's ability to legislate in an area. It is clear that a balance must be struck between state intrusion into the lives of citizens and the individual's ability to determine her choices. Notionally, "…whatever is denominated as being part of the private realm is not amenable to state regulation, and is thus an area properly left to the realm of toleration. On the other hand what is denominated as the public realm is one which is the proper area of state intervention."[240] It is equally important to recognize that too sharp a division between the public and the private would allow the distinction to be used "to screen certain information (information that is an important aspect of the identity of a group) out of the public conversation on the account of it being a private and not public concern, especially when what constitutes private is defined in terms of how controversial the issue is."[241] What must be kept in mind is that the line between public and private shifts, and is in constant negotiation.

Part of this negotiation in a multicultural and democratic society is an understanding of individuals as being at the intersection of various identities. One identity would be an individual's membership in the cultural of religious community while another would be that same individual's citizenship within the state. But there are numerous other identities that need to be taken into account.

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[239] Ayelet Shachar, 'Reshaping the Multicultural Model: Group Accommodation and Individual Rights' (January 1998) 8 Windsor Review of Legal and Social Issues 83 at 95.

[240] Adeno Addis, 'On Human Diversity and the Limits of Toleration' in Ian Shapiro and Will Kymlicka eds., *Ethnicity and Group Rights* (New York: New York University Press, 1997) at 117.

[241] Adeno Addis, 'On Human Diversity and the Limits of Toleration' in Ian Shapiro and Will Kymlicka eds., *Ethnicity and Group Rights* (New York: New York University Press, 1997) at 134.

> The intersectionist view takes into account the conception of personal identity as fragmented, discursive, positional, and imbued with multiple ascriptions. As Pierre Birnbaum observes, in contemporary multicultural theory "individuals…are [mistakenly] understood as the bearers of a single oppressive and quasi-essentialist idealized cultural identity from which no escape is possible. Such an immutable collective identity is not compatible with the expression of other identities (sexual, religious, etc.) in which some might wish to recognize themselves at certain moments of their existence." The intersectionist view of identity, on the other hand, would acknowledge the *multidimensionality* of insiders' experiences and would capture the potential double or triple disadvantages that certain group members are exposed to given their *simultaneous belongings*. Moreover, an intersectionist view would recognize that group members are *always* caught at the intersection of multiple affiliations. They are group members (perhaps holding more than one affiliation) and, at the same time, citizens of the state.[242]

This latter aspect is of crucial importance for us, since in a liberal democratic, multicultural society such as Canada, including Ontario, it is citizenship that allows membership in the minority community to take shape. As a result, the foremost political commitment of all citizens, particularly those who wish to identify at a cultural or religious level with a minority outside of the mainstream, must be to respect the rights accorded to each one of us as individual Canadians and Ontarians.

Commitment to individual rights lies at the core of the legal and political organization of any liberal democracy and underpins freedom of religion and expression, and the rights of minorities to legitimately enter into dialogue with the broader society with any kind of legitimacy. It is illogical and untenable to claim minority rights in order then to entrench religious or cultural orthodoxies that seek to trample the individual rights of select others. Accommodation of cultural difference and respect for minorities should not extend this far. Rather, tolerance and accommodation must be balanced against a firm commitment to individual agency and autonomy.

This boundary on tolerance and accommodation exists on many levels, not the least of which is the public consciousness of Ontarians. *Charter* values animate our public discourse, in addition to providing guidelines for the enactment of public policy. Far from being empty rhetoric, I saw and heard the extent to which this holds true for people from all sides of this debate. The Ontarians I met with, and most of those who wrote to me, believe in the *Canadian Charter of Rights and Freedoms*. They believe deeply in the *Charter*'s aims of justice, fairness, and equality for all Canadians. In this sense, multiculturalism is not perceived to be an unlimited right.[243] The failure of any minority community to demonstrate respect for widely adhered to legal, political and social norms such as these creates a serious obstacle to public confidence that the community is able and willing to deal with the rights and obligations of its members as citizens in the broader society.

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[242] Ayelet Shachar, 'Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation' (1998) 6:3 The Journal of Political Philosophy 285 at 296.

With respect to the Muslim communities, this issue is complicated by the fact that there appears to be little tolerance in many of them for religious heterodoxy or other differences of opinion.[244] While this may be changing, many of the loudest Muslim voices, worldwide and here in Ontario, are the most reactionary. Questioning religious orthodoxy is frequently said to be tantamount to heresy, and those who do challenge Islamic orthodoxy are often simply told they are not real Muslims.[245] Leaders within the Muslim community have repeatedly made statements that justify unequal treatment of women under Muslim law.[246] As a result, many Ontarians have understandable difficulty in believing that the rights of women in arbitrations undertaken by Imams or other male members of the Muslim communities, will be respected or that the individual rights of any community members will be honoured if there is conflict with the interpretation of Muslim law being used.

Nonetheless, incorporating cultural minority groups into mainstream political processes remains crucial for multicultural, liberal democratic societies.[247] By availing itself of provincial legislation that has been in place for over a decade, and that has been used by others, the Muslim community is drawing on the dominant legal culture to express itself. By using mainstream legal instruments minority communities openly engage in institutional dialogue. And by engaging in such dialogue, a community is also inviting the state into its affairs, particularly since the *Arbitration Act*, even in its present form, specifically sets out grounds for state intervention in the form of judicial oversight. Use of the *Arbitration Act* by minority communities can therefore be understood as a desire to engage with the broader community.

In multicultural societies such as our own, this type of engagement ultimately aims at creating a "genuine sense of shared identity, [and] social integration."[248] Of course, for this dialogue to be optimal, a number of elements must be present. For instance, resources must be allocated and affirmative steps taken in order to allow communities to engage fruitfully with one another in a public conversation about what it means to be living together in peace and mutual respect.

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[243] See: The Australian Law Reform Commission, *Multiculturalism and the Law: Report No.* 57, (Australian Law Reform Commission, 1992) at 9.

[244] See: Irshad Manji, *The Trouble With Islam: A Wake-Up Call for Honesty and Change* (Toronto: Random House Canada, 2003).

[245] Submission of the Muslim Canadian Congress (August 26, 2004).

[246] Syed Mumtaz Ali, 'An Update on the Islamic Institute of Civil Justice' News Bulletin (Canadian Society of Muslims, August 2004) at 6.

[247] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) at 150.

[248] Adeno Addis, 'On Human Diversity and the Limits of Toleration' in Ian Shapiro and Will Kymlicka eds., *Ethnicity and Group Rights* (New York: New York University Press, 1997) at 128.

In this context I believe it is important to seek solutions that attempt not only to respect the rights of minority groups in the larger cultural and political context of Ontarian society, but also to ensure that individuals within that minority, as citizens of this province, are able to exercise their rights as individuals with the greatest of ease and with minimal cultural and personal risk.

Domestic Violence: A Public Policy Priority

Domestic violence, once a hidden problem regarded as a private matter within the home, is now seen by governments in Canada and in many jurisdictions around the world as a serious public policy priority. This realization came about as a result of the courageous and tireless efforts of women over the past thirty years to expose the nature, prevalence, dynamics and effects of violence within the family and to persuade governments that political action is necessary and appropriate to end the suffering of individuals and to deal with the economic, health and social impacts of domestic abuse. Women, employing a feminist analysis, came to understand that their gender was the primary risk factor for violence against them throughout the entire world and that violence against women occurs in all societies, cultures, religions, and socio-economic groups.

Building international strength through the United Nations Decade of Women, women activists succeeded in having the *United Nations Declaration on the Elimination of Violence Against Women* passed by the General Assembly in 1993.

The *UN Declaration* defines violence against women as:

> Any act of gender-based violence that results in or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or private life.
>
> [It] is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and which have prevented women's full advancement. Violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared to men.[249]

The *Declaration* goes on to outline in detail the various forms of abuse it is addressing:

> Article 2 of the UN Declaration clarifies that the definition of violence against women should encompass but not be limited to, acts of physical, sexual and psychological violence in the family and the community. These acts include

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[249] Resolution, *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, UN GAOR, 1993, Supp. No. 49, UN Doc. A/48/49 (1993) at Art. 1.

> spousal battering, sexual abuse of female children, dowry-related violence, rape, including marital rape, and traditional practices harmful to women, such as female genital mutilation (FGM). They also include non-spousal violence, sexual harassment and intimidation at work and in school, trafficking in women, forced prostitution and violence perpetrated or condoned by the state, such as rape in war.[250]

In Canada, until the 1980's, woman abuse was treated as a private matter. Although "cruelty" had been a ground for divorce prior to the *Divorce Act, 1968*, it was difficult for women to prove they had been abused within their marriage and humiliating to have to expose their victimization to the world. At that time, if law enforcement personnel were informed of assaults between spouses, they might intervene to separate the parties; however, charges were seldom laid and, if laid, seldom prosecuted vigorously. Sentencing upon conviction tended to reinforce the impunity of perpetrators. Through the political action of the women's movement, public education about violence against women and services designed to assist women fleeing violence in their homes began to emerge in communities across the country. As a result, a movement to turn government attention to the matter grew in strength, particularly in the context of the debate around the inclusion of women's equality rights in the *Charter of Rights and Freedoms*.

When the issue of domestic violence was raised for debate in Parliament in 1982, the matter was initially treated as a joke by some Members of Parliament. However, the women's movement forged alliances with other groups concerned about abuse of women and children, putting the issue at the forefront of law reform and policy development. The National Panel on Violence Against Women was created and it traveled across the country gathering evidence about the seriousness of woman abuse. The Panel's report provided a detailed analysis of the extent, nature and effects of violence on women and girls in Canada, showing through extensive research that more than half of Canadian women experience some form of physical and/or sexual abuse, as defined by the *Criminal Code of Canada*.[251] Research also showed that, already at risk as a result of their gender, women who are marginalized in other ways, by language, race, lack of employment or disability, are at even greater risk of abuse.

> Domestic violence is distinguished from other forms of gender violence by the context in which it occurs (the domestic, or private sphere) and the relationship between perpetrators and victims (familial). When violence occurs within the context of the family, it raises questions about the laws and legal administration of family relations. Is intrafamily violence legally permitted or prohibited? In practice, is it tolerated or penalized by the authorities? Are civil remedies

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[250] Johns Hopkins School of Public Health, and Centre for Health and Gender Equity, 'Issues in World Health' in XXVII:4 *Population Reports: Ending Violence Against Women* (Baltimore: Johns Hopkins School of Public Health, Center for Health an Gender Equity, 1999).

[251] The Canadian Panel on Violence Against Women, *Final Report, Changing the Landscape: Ending Violence~Achieving Equity* (Canadian Panel on Violence Against Women, 1993).

> available to victims (e.g., right to divorce, restraining orders)? In contexts where intrafamily violence is not prohibited by law (i.e. criminalized), perpetrators enjoy *legal impunity*. In contexts where it is prohibited but the laws are not enforced, perpetrators enjoy *social impunity*.[252]

Anti-violence activists in Canada joined together to persuade governments of the necessity to use criminal processes to address abuse within the family and to build supports for abused women and children through community-based programs. The *Criminal Code* was amended in 1985 to better address issues of sexual abuse of children; spousal rape, not previously recognized as a crime, was included at that time. The *Code* was further strengthened in 1994 to include a specific crime of criminal harassment. Legislative and policy initiatives have continued to the present, all aimed at preventing abuse of women and children, ensuring that abusers are made accountable for their actions, and requiring that the police, Crowns, judges, and service providers accept responsibility within their spheres of influence.

Changes were made in family laws in an attempt to protect women and children from financial abuse and neglect when relationships end in divorce, desertion or death. Civil restraining orders became available. Child protection legislation, amended in 2000, increased the obligation of all citizens to intervene to protect children from abuse and neglect.[253] The Ontario government continues to develop policy, programs and legislation to address the issue of domestic violence and to create a commitment within the whole community to ending abuse against women and children.

However, legal changes, while necessary, are hardly sufficient to end domestic violence; attitudes and beliefs that condone abuse must change.

> The pervasiveness of impunity (whether de jure or de facto) is evident in the fact that domestic violence is reported as "common" in almost all countries, although estimated rates vary. Impunity suggests a reluctance or resistance to recognizing and dealing with intrafamily violence *as violence*. By imagining and referring to beatings, confinement, intimidation and insults as "discipline" or punishment" rather than "battery" or "abuse," the nature of harm is obfuscated. Moreover, if prevailing social beliefs about family relations include the idea that men have a right or obligation to punish and discipline female family members, then the tactics used to do so can be seen—and even lauded—as necessary to maintain order at home and in society at large. The problem of impunity is exacerbated by social and legal constructions of the family as private and popular perceptions of male power (including to dominate and aggress against women) as normative.[254]

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[252] Lisa Hajjar, 'Religion, State Power, and Domestic violence in Muslim Societies: A Framework for Comparative Analysis' [unpublished] in submission of the Canadian Council of Muslim Women (July 23, 2004).

[253] Lisa Hajjar, 'Religion, State Power, and Domestic violence in Muslim Societies: A Framework for Comparative Analysis' [unpublished] in submission of the Canadian Council of Muslim Women (July 23, 2004).

[254] Lisa Hajjar, 'Religion, State Power, and Domestic violence in Muslim Societies: A Framework for Comparative Analysis' [unpublished] in submission of the Canadian Council of Muslim Women (2004).

The issue of domestic violence lies at the core of the opposition to arbitration of family law matters. There is a strong apprehension that allowing family matters to be dealt with in private arbitration will permit family violence to remain hidden where it ought to be brought to light and will permit perpetrators to avoid being held accountable for their actions. Women's advocates have always believed that the continuing inherent imbalance of power between men and women will make it difficult, if not impossible, for women to be treated equally in alternate dispute resolution, particularly if domestic abuse has been part of their experience. Because perpetrators of domestic abuse use violence to establish and maintain control over their partners and children, they often continue their behaviour after a relationship is over by refusing appropriate financial support, using custody and access disputes as a means of continuing to exert power and, in the most extreme cases, even threatening or carrying out threats to kidnap children if the partner is awarded custody. As we saw in Section 4, opponents of arbitration believe strongly that the courts offer the best protection available, however imperfect that may be, against abusers' systematic attempts to maintain power and control.

While these fears about arbitration were articulated for all women, they were exacerbated when the rules to be applied were those of Muslim family law. As noted in Section 4, the Review heard repeatedly that the social and familial context within which Muslim women live, increases their vulnerability and makes it difficult for them to take action to keep themselves and their children safe.

> Domestic violence is strongly—and directly—related to inequality between men and women. But the contested legitimacy of gender equality impedes or complicates efforts to deal with domestic violence as a social problem in many parts of the world. There is strong and pervasive opposition to the notion that men and women *should be equal* in the context of the family. The corollary is the belief that domestic relationships are legitimately (i.e. naturally and/or divinely) hierarchical. In Muslim societies, this belief is both derived from and reinforced by *shari'a*, which tends to be interpreted to give men power over women family members. Thus gender inequality is acknowledged and justified in religious terms on the grounds that God made men and women "essentially" different; that these differences contribute to different familial roles, rights and duties, which are complimentary; and that this complimentarity is crucial to the cohesion and stability of the family and society.[255]

Respondents to the Review shared personal stories of discrimination explaining how attitudes about inequality are deeply ingrained in Muslim society and how women experiencing abuse are unable to get appropriate assistance within their community. They fear that arbitration using Muslim norms will ensure abusive men receive impunity. There is no doubt that there are those in authority within the Canadian Muslim community who continue to condone and justify abuse of women. As I was writing this report, Sally Armstrong wrote an article, "Criminal Justice," in which she quotes Imam Aly Hindy directly, who speaks regularly at the Salaheddin mosque in Toronto:

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[255] Lisa Hajjar, 'Religion, State Power, and Domestic violence in Muslim Societies: A Framework for Comparative Analysis' [unpublished] in submission of the Canadian Council of Muslim Women (July 23, 2004).

> He claims his take on wife-beating is founded in the Qur'an. "You have to take steps," he says. "First, you talk to her a lot. Second, you refuse to sleep with her because that will insult her. You don't need to hit her unless she's a rebel and won't do what you say." He feels that a woman who calls the police when she has not been *severely* beaten is wrong. "She should come to me. I'll talk to the man and follow up and decide if he's a good man. Then I'll recommend that she forgive him."[256]

It was clear from the submissions and the research done during the review that many different forms of domestic abuse are justified within the Muslim community by specific texts from the Quran and the *hadith*. It was equally clear that there is a strong movement within the Muslim community to re-examine the conservative interpretation of Muslim law on such issues as wife-beating, marital rape, forced marriages, and the unequal status of women.

> There are debates over whether *shari'a* should be interpreted to sanction, restrict, or prohibit domestic violence. In contexts where *shari'a* is interpreted to permit violence against women by family members, the harms women suffer not only go unpunished but also unrecognized *as harms*. However, such interpretations are neither universal across Muslim societies nor universally accepted even within societies where intrafamily violence is sanctioned on the basis of *shari'a*[257].

Many respondents urged the Muslim community to take positive action to counter the traditional attitudes that condone violence against women. Wahida Valiante, of the Canadian Islamic Congress, herself a social worker and scholar, is representative of these views:

> But here we are caught in a very sad situation. Most Muslims say that they hold up the Qur'an as the most important source for all Islamic issues, yet when it comes to actual practice, it seems that "traditions" are more influential in determining how we conduct our lives. Nowhere is this more noticeable than in the treatment of women. Traditional attitudes and values driven by political and cultural considerations and bound by time and space interpretations of certain words in the Qur'an have been used to permit violence against women in Muslim families.
>
> Over the centuries, the plight of the Muslim family and, in particular Muslim women, in most Muslim countries, is not due to any deficiency in Islamic intellectual, philosophical or ideological thought. On the contrary, the deficiency

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[256] Sally Armstrong, 'Criminal Justice' *Chatelaine (*November 2004) 152 at 158.

[257] Lisa Hajjar, 'Religion, State Power, and Domestic violence in Muslim Societies: A Framework for Comparative Analysis' [unpublished] submitted by the Canadian Council of Muslim Women (July 23, 2004).

> is in the implementation of basic Islamic principles of equality and justice. In reality, the prevailing patriarchal family system in Muslim countries does not reflect the Islamic worldview on couple and family relationships and is in need of critical reexamination in the light of current Qur'anic knowledge and Prophetic traditions. To continue to perpetuate these traditionalist views on gender relationships harbors the potential for even greater physical, psychological and emotional harm.[258]

The National Association of Women and the Law similarly pointed out that there is great potential for a change in attitude toward women's equality rights:

> Increasingly, Muslim feminists and Islamic reformers are asserting that the Qur'an and the example of the prophet provide much support for the idea of expanded rights for women. A growing movement of Islamic feminists is contesting the model of gender rights and duties found in traditional Islamic jurisprudence and discourse and promoting instead interpretations and understandings of Islamic law and justice rooted in notions of gender equality. Contemporary Muslims such as Abdullahi An-Na'im and Fatima Mernissi have reexamined the sources and concluded that Islam calls for equal rights for men and women.[259]

Others in the Muslim community, including the Islamic Council of Imams – Canada, CAIR-CAN, the Council of Canadian Muslim Women, and Masjid El Noor, for example – acknowledged that the community itself must work together to ensure that violence within the community is addressed appropriately. Changes of this sort cannot be legislated by governments but must arise within the community through thoughtful study, discussion and interpretation of sacred principles.

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[258] Wahida Valiante, 'Domestic Violence – An Islamic Perspective' (Keynote Address, London Centre and Mosque June 26, 2004).

[259] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).

Lisa Hajjar maintains,

> Although *shari'a* is critically important for understanding family relations in Muslim societies, it does not constitute an explanatory device for the problem of domestic violence. Rather explanations must be sought by analyzing the relationship between religious law and state power as it bears on the permissibility or prohibition of violence with the family and the rights of women. ...
>
> The role of the state is particularly important to any discussion of domestic violence because states are vested with the responsibility to prohibit and punish *violence*. ...Even in societies with robust legal rights for women, the prevalence of domestic violence signals an enduring difficulty to activate a legal solution. Thus, while the status and rights of women within the family vary significantly, the global scope of domestic violence suggests a cross-national complicity by state agents and the constituencies on which they depend for power and support to foster conditions in which impunity can thrive. Acknowledging this fact is an important rejoinder to cultural stereotypes that Muslim women are uniquely or exceptionally vulnerable. [260]

During the Review process, most respondents who expressed concern about domestic violence against women, also addressed the vulnerability of children. Although aware that the courts in Canada continue to have jurisdiction over issues relating to children when relationships break down and must make decisions in accordance with the best interests of the child, this is not true in many countries where Muslim law prevails. The Submission from Justice for Children and Youth points out:

> Most of the countries which practice Sharia law opted out of the provisions of the *Convention on the Rights of the Child* which conflicted with Sharia law... In particular, they objected to the articles which spoke to the equality of children with respect to gender, as well as the rights of adoptees. Sharia law does not recognize adoption, or therefore, the rights of adopted children. Only biological children born in wedlock are recognized as having status within the family. This includes the right to financial support and the right to have "the best interests of the child" as the primary consideration in making decisions that affect the child. Sharia law may expressly take away the freedom of religion as it may ban the child from ending Islamic beliefs. ...As a matter of public policy, we cannot allow parents to give away the equality rights of their female and male children, their children born in and out of marriage, their children adopted, by choosing to participate in a decision-making process that does not recognize the rights and benefits granted to all children by Canadian and Ontario law. [261]

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[260] Lisa Hajjar, 'Religion, State Power, and Domestic violence in Muslim Societies: A Framework for Comparative Analysis' [unpublished] submitted by the Canadian Council of Muslim Women (July 23, 2004).

[261] Submission of Martha McKinnon for Justice for Children and Youth, 'Sharia Law and Children's Rights' (November 11, 2004).

The reason for addressing the best interests of children under the domestic violence section is the frequency with which abusive parents use their children as pawns in their disputes and attempt, through custody, access and support provisions, to continue to control and harass a former partner.

> Under Sharia law, custody of the children primarily goes to the husband. In the case of very young children, there is joint custody only up to the age of seven, [then] the husband gets full custody. There does not appear to be a provision requiring decisions to be made in the best interests of the child or to consider the wishes of a child who is able to articulate them, but rather, the issue of custody is treated as simply parental rights. …the concerns that have been expressed about how coercion can be prevented as a weapon to defeat women's equality rights ring even stronger for children. Children are in a very vulnerable position within the family, not only because of their size but also because of their economic dependency.[262]

When parents are immigrants from another country, the vulnerability of women and children is heightened. Women who have been sponsored by their partner may not know that the sponsorship arrangement can be broken without her losing her status in Canada when violence is the cause of the breakdown. Another fear is that, without sponsorship, they will be returned home without their children, who often are born in Canada, they may accede to unreasonable demands from an abusive partner.

The fear, articulated very clearly by a number of respondents, is that children will be taken back to the family's country of origin and children will have no access to the other parent, whatever the custody and access arrangement may have been or what family law process was followed. Although the Canadian Criminal Code and the Hague Convention address the situation of child abduction by a parent, many countries, particularly in the Muslim world, are not signatories to the Convention and a criminal case requires the offending party to be tried in Canada. Many women, in both the dominant and minority cultures, are willing to waive their own rights to ensure the safety and security of their children; they believe the threats of abusive partners that they will never see their children again unless they bend to the partner's demands. In many cases, Muslim countries of origin require a husband's permission for a wife or children to obtain a visa, often even if a Canadian divorce has been obtained; an abusive former partner can effectively prevent his ex-wife and children from access to her family by refusing to sign.[263]

Most respondents were clear that, because of the impact of domestic violence on women and children, the issue must be addressed when family law disputes arise. Many respondents urged that screening for abuse be required, not only in mediation, but in arbitration, to ensure that violence has been taken into account in determining whether arbitration was freely chosen and whether the process offers sufficient safety for vulnerable parties. Some believe that arbitrators must be held accountable in some way for the safety of their clients.

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[262] Submission of Martha McKinnon for Justice for Children and Youth, 'Sharia Law and Children's Rights' (November 11, 2004).

[263] Submissions of individuals with the International Campaign Against Shariah Court in Canada (2004).

Impoverishment of Women and Children

Respondents to the Review consistently raised concerns that the use of arbitration for family law and inheritance matters, particularly where religious principles are used, would lead to the impoverishment of women and children.

In Ontario, successive waves of law reform have sought to distribute family assets on marriage breakdown or death in such a way that no dependent person would be impoverished as a result, as long as there were, in fact, assets available to the family. This policy position is consistent with the understanding that citizens, through pooled tax dollars, will provide for the needs of those who are unable to provide for themselves. Consequently, public funds are intended to be the last resort for supporting the poor, not the first resort. Governments therefore have an interest in ensuring that people fulfill their obligations to dependent family members, rather than relying on the public purse to assume those responsibilities.

Over the last century, legislative measures gradually have been taken to try to improve the financial and social security of women and their children. First with the *Family Law Reform Act* of 1978 and then by the *Family Law Act* of 1985, Ontario legislated the division of family assets and the support of common law spouses and children born outside of marriage upon relationship breakdown. In 1978, Ontario law recognized the rights of dependent opposite sex common law spouses and their children to support; in 1999 the Supreme Court of Canada extended support rights to same sex couples. As we discussed in the Family Law Section of this report, parents have a support obligation to any biological child and any child who they have demonstrated a settled intention to treat as a child of their family. Thus, a parent who has multiple children by multiple partners, whether married or not, remains responsible for the support of those dependent children. Both parents have support obligations, regardless of gender. This gradual broadening of support obligations can be understood as expressing society's desire to ensure that people fulfill their support obligations. Over the past 20 years, government enforcement of support obligations has reinforced this goal.

At first, even with the provision of support in family law, the amounts of support ordered by the court were often very low, comparable to welfare provisions rather than being related to the actual resources of the support payer. As a result, women and children almost invariably experienced a severe drop in their standard of living on the breakdown of a relationship and often sought social assistance. In 1997 both the federal *Divorce Act* and the *Family Law Act* incorporated child support guidelines, based on the income of the non-custodial parent, which form the basis of support orders for dependent children. Policy work is currently ongoing with respect to spousal support guidelines. Legislative and policy initiatives have been designed to enforce payment of support ordered by the court.

A major concern with arbitration under Muslim family law, in particular, is the difference between its provisions for support of women and children and those provisions in Ontario and Canadian law. Most respondents reported that Muslim family law only requires support of a divorced woman for three menstrual cycles or until the birth of a child already conceived at the time of the divorce. Muslim family law does not recognize the legitimacy of children born out of wedlock for either support or inheritance purposes. From my discussions with respondents, I understand that unless there is a contract that says otherwise, "temporary" wives, where allowed by Muslim law, are not entitled to support when the relationship ends. Muslim law also does not guarantee the inheritance by dependent spouses and children in intestate succession to the extent provided for under Ontario law. Many in the Muslim community who support religiously-based arbitration expressed concerns about the plight of women and children left impoverished upon the breakdown of marriage or an informal relationship.

The obligation for Muslim men to support wives and children is part of their religious duty. However, the duty is extremely limited in comparison to what is required by Canadian and Ontario law. Muslim family law is based on the premise that women and children will be cared for by the nearest male relative, if they do not have a husband or father to support them. As a result, if a marriage breaks down, it is important to free both parties as soon as possible so that they can find a new partner. If a new partner is not found, the woman's family is expected to support her. Failing a supportive family, the woman relies on the community for support. In Islamic countries, people are expected to donate to community organizations that provide support in these instances, with mixed results. Many people who have immigrated to Canada find themselves here without immediate or even extended families and may not have the familial support that was expected when Muslim laws were formulated. Similarly, welfare provisions funded out of universal taxation were not anticipated at the time the Qur'an or the *hadith* were written. Nor when women were exempted from the obligation to support their families was it anticipated that women would be the sole breadwinners in their families, a situation common for new immigrants in Canada.

Given all these factors, it seems logical to examine what provisions could ensure that arbitration decisions based on religious laws do not disentitle spouses and children from the support provisions they are accorded under Canadian and Ontario law, thus thrusting them onto the welfare system. As the Review heard repeatedly, there must be additional safeguards and appeal provisions written into the legislation or included in regulations to the legislation to ensure that systematic impoverishment of dependent spouses and children does not result when parties choose religious arbitration to resolve family disputes.

Access to Justice Issues

Many respondents to the Review perceived the availability of mediation and arbitration for family matters as an access to justice issue. Interestingly, some viewed mediation and arbitration as opening new doors to the justice system, enhancing the ability of parties to find a mechanism that suits their particular needs, and so enhancing their access to justice. Others, however, felt that arbitration and mediation could result in parties' being denied justice in a public forum through the courts. It is worthwhile to review these arguments since all sides of this discussion professed a desire to protect and enhance access to justice for vulnerable people.

Financial considerations can be a serious constraint to access to justice. Litigation of family disputes in courts is often a very expensive and lengthy process. As a result, the financial burden of litigation can be a substantial detriment to access to justice for women.[264] In many cases, women who enter into litigation pay legal costs over several years, and end up depleting a substantial portion of any assets awarded at the end of the process. Women who cannot afford the cost of litigation often apply for legal aid, and then must repay the fees when they reach a financial settlement, often finding they paid more in legal fees than they received at the end of the day. Many women who work outside the home are not eligible for legal aid at all and must finance their legal costs privately; some are forced to seek out loans on which they may have to pay interest over a lengthy period of time.

Alternative dispute resolution mechanisms, such as mediation and arbitration, are flagged as low-cost, faster alternatives to the court system. While some respondents suggested that arbitrators, particularly those who operate their services as businesses, rather than non-profit enterprises, charge excessive fees, parties who have used the system have indicated that it is certainly a less expensive alternative to litigation through the courts "100% of the time."[265]

In the realm of religiously-based mediation and arbitration services, the majority of those appearing before the Review offered their services at very low cost, partly as a community service and partly to encourage the members of their communities to choose this dispute resolution route.

It is important to note, however, that "cheaper" does not necessarily make the system affordable or accessible to all people, and parties who chose this route of dispute resolution may still require some financial assistance in accessing justice. Based on current criteria, it does not seem that Legal Aid or any other public funding would be available for arbitration cases, either to pay for the arbitrator, to finance independent legal advice or to pay any costs for accountants, expert witnesses, child assessments, and so on. Without resources, it is often hard to put forward a convincing case. Although arbitrators are able to assign costs at the end of the process, the most frequent decision is for the parties to share costs equally.

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[264] Statistics Canada shows that, in 2002 the average annual salary of women in Canada was $25,300 versus $38,900 for men. Statistics Canada, *CANSIM Table 202-0102* (Ottawa: Statistics Canada, 2004), online: <http://www.statcan.ca/english/Pgdb/labor01a.htm>.

[265] Submission of the Advocate's Society and the Canadian Bar Association (August 26, 2004).

Most respondents stressed the importance of access to independent legal advice in family matters. Parties who choose arbitration may not have any legal advice on their rights or options under the law. However, it was pointed out that the Supreme Court of Canada has noted that independent legal advice at the time of negotiation (in family disputes) is an important means of ensuring an informed decision to enter an agreement.[266]

If independent legal advice is required for all parties in arbitration as a means to ensure complete understanding of legal rights and options as well as free consent, the question of who will pay for the advice remains. While some respondents looked hopefully at the possibility of pro bono services or duty counsel, most advocated for an expansion of Legal Aid funding to ensure that those using mediation and arbitration get the independent legal advice they require. Some respondents pointed out that widespread use of arbitration would free up the courts and save many dollars now spent on litigation which could then be transferred to finance better access to legal advice. Many opponents of arbitration were cynical, stating that the only reason the government is permitting arbitration of family matters is to save court costs; they urged the government to put access to justice ahead of cost considerations.

Critics of arbitration argue that the public court system, in spite of its problems, at least offers some safeguards and support services such as Legal Aid, language interpretation, information services, duty counsel, a public legal forum, and other resources for vulnerable people. This is particularly significant for women who have little or no knowledge of their options and rights under the law. While even many well-educated and informed women lack an understanding of their legal rights, this problem is compounded when considering immigrant women or women who are isolated in their communities.

Under the arbitration system, there are currently no provisions that require arbitrators, or any other third party, to inform parties involved in the process of their rights and options under the law. In fact, women's organizations believe that in religiously-based arbitration, arbitrators may strongly encourage parties into opting for religious-based dispute resolution as the only religiously acceptable choice.[267] In the absence of clear information about options and the consequences of choosing religious arbitration, women are not making informed choices and may choose a form of law that will deprive them of rights they don't even know they have in Canada.

Immigrant women who may come from countries where the laws on gender equality and family matters are very different from Canada may accept, or be coerced into accepting, arbitration as their only option by their community, religious leader, family or spouse. As well, for some, linguistic and economic barriers may have a negative impact on their ability to educate themselves on their options and make them dependent only on the information provided by their community, religious leader, family or spouse.

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[266] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004). See also *Hartshorne v. Hartshorne* [2004] S.C.C. 22 at 36.

[267] Brochure of The Islamic Institute of Civil Justice, online: < http://muslim-canada.org/brochure.htm>.

Parties to a family dispute are not required to use litigation to decide their matter. Under the law, it is not illegal for either party in a family dispute to opt out of his or her rights in making a separation agreement, with or without mediation. It is argued that in many cases it is the female partner who decides to contract out of property and support settlement rights in order to facilitate the separation process and ensure her safety as well as custody of or access to her children.

While this can happen both in the court system and in alternative dispute resolution processes, under Ontario's family law regime "agreements on property division and spousal support require full disclosure of finances from each party and a clear understanding of the consequences of the agreement."[268] A clear understanding of the nature and consequences of the agreement typically includes the ability to read legal documents and to access to independent legal advice. If these criteria are not met, a court can set the agreement aside if one party applies to the court for relief. Further, "where as a result of a marriage breakdown one party would require social assistance, the government would rather have that party's former spouse pay spousal support as required than burden the state with this matter." [269]

Arbitration, on the other hand, allows parties to agree to have their civil dispute settled by a third party in a private setting, using any rules of law that may exclude safeguards set under the *Family Law Act*. Critics of this process are concerned that the private, unregulated and informal nature of arbitration and the possible power imbalance in partners is more likely to result in unfair settlements where "women may cede hard won rights behind closed doors"[270], and that may result in their being dependent on social welfare, thus putting further pressure on the system. As the arbitration process is private, the court would have no knowledge of such unfair or unequal decisions unless the arbitration decision is contested on the grounds currently available for appeal.

Although the court system offers interpretation services to accommodate the needs of Ontario's diverse community, it is widely accepted that many concerns with respect to its cultural sensitivities remain. Many of those working with immigrant and refugee people, particularly those who may be perceived as hostile to Canada by virtue only of their race or national origin, identified incidents of discrimination and racism that impede access to justice. In the court system, parties have no control over which judge will preside over their case. In some instances, presiding judges have indicated discomfort in dealing with cultural and religiously based issues, such as *Mahr*. Some contributors have pointed out that there is "an 'apparent cultural anxiety' in Ontario associated with entering the 'religious thicket', a place that the courts cannot safely and should not go."[271]

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[268] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).

[269] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).

[270] S. A. Goundry et. al., *Family Mediation in Canada: Implications for Women's Equality* (Ottawa: Status of Women Canada, 1998).

Ultimately, parties looking for a more personalized and thus a more acceptable form of dispute resolution may find it in the arbitration process. For many people, this means choosing a dispute resolution mechanism that recognizes their cultural background and personal value system, beliefs and faith, which is simultaneously a voluntary process, and affords them some control over the situation. The arbitration may be conducted in the parties' own language, thus ensuring them better understanding of the process and the evidence. For many, the privacy of the process is consistent with their priority for "modesty" and "discretion". Some respondents pointed out the lack of success in the court system of ensuring compliance with support or restraining orders, and argued that the decision of faith-based arbitrators may be more respected and obeyed if recalcitrant parties feel obliged by their faith to follow the orders made.

In spite of strides made in achieving gender equality in Canada, many mainstream and new immigrant communities are largely patriarchal in nature. A woman may be told that it is her religious or community duty to accept whichever adjudicative route is chosen for her. Her fear of isolation from her community, the possible negative impact on her children, and concerns of being considered an apostate in her faith may force her into submitting to one form of dispute resolution over another. The problem may be compounded by the intersectionalities of vulnerabilities that include perceived immigration sponsorship debt, disabilities, issues of class and race, violence and abuse.

While coercion and pressure can influence any settlement, even in the court system, "the Family Law regime in Ontario (including the *Family Law Act*, *Divorce Act*, *Children's Law Reform Act*, other statutes and common law) represents years of important reform in the area of women's rights and women's equality. This work has been aimed at dismantling the legal perpetuation of the patriarchal model of family relations, through reforms such as support requirements for dependent spouses, equalization of net family property, and common law constructive trust principles."[272] Some feel that using arbitration, particularly in faith-based settings, may mean these protections will not be honoured by more patriarchal cultures and women may not be treated with justice according to those hard-won rights. Others believe that religiously based mediation and arbitration is a forum in which the values of equality, fairness and justice can be insisted upon because those values are being espoused by the religious and cultural leaders the parties respect.

Women's organizations and other critics of the arbitration system assert that there are currently very limited grounds for appealing a decision made under the *Arbitration Act* and that women's rights are better safeguarded under the traditional justice system employing Ontario's family law regime. In its present state, the *Arbitration Act* does not provide for appeals if a party did not understand the nature or consequences of the domestic contract, or on grounds of incomplete financial disclosure, or duress, misrepresentation or inequality in bargaining power. The ability to appeal a decision on the above mentioned grounds are considered of utmost importance to women. It is argued that women with vulnerabilities that include lack of information, linguistic barriers, risk of coercion etc. would benefit from a wider range of grounds for appeal under arbitration. Only one group, FACT, urged that there be fewer grounds for appeal.

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[271] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).
[272] Submission of Legal Education and Action Fund (LEAF) (September 17, 2004).

It is clear, then, that the access to justice considerations look quite different from the perspective of the opponents and proponents of arbitration. The challenge for the Review is to take account of all sides of the issue in an attempt to provide recommendations that may resolve these disparate concerns.

Section 7: Suggestions from the Review Submissions

Some respondents to the Review felt so strongly that arbitration should not be allowed in family law matters and, even more strongly, that religiously-based arbitration should be disallowed, that they declined to make any suggestions as to how the *Arbitration Act* or other legislation could be changed to better protect vulnerable people. The NAWL submission made the point by outlining the kinds of questions that need to be answered:

> This paper has not considered strategies for law reform as it is felt that a broad consultation of different groups, both Muslim and non-Muslim, is required to identify and evaluate strategies for ensuring that women's constitutional equality rights are not infringed in the process of arbitration. It is critical that certain questions be explored such as: is it possible to include safeguards to the arbitration process that will adequately protect women? Can one avoid the predictable limits of such safeguards? Is it possible to reinvent dispute resolution such that feminist concerns are met?[273]

However, others making submissions to the Review saw the Review process as the first step in answering these questions. Many respondents suggested concrete changes that they felt would address some of the possible risks to vulnerable individuals, if family law matters continue to be resolved using mediation and arbitration. As has been evident, particularly in Section 4, even respondents who support the use of arbitration believe that alternative dispute resolution requires safeguards to ensure that vulnerable people who choose arbitration have a similar level of protection of their rights that they would experience if their dispute were resolved through the courts.

Education and Training of Mediators and Arbitrators

Many commentators decried the lack of regulation and qualifications for arbitrators, pointing out that the *Arbitration Act* does not set standards for training or provide a code of conduct under which arbitrators must operate. No matter what position was taken about the use of religious principles in the arbitration of family law matters, most submissions called for minimum qualifications and standards for both mediators and arbitrators. One of the most outspoken proponents of better standards was Syed Mumtaz Ali of the Islamic Institute for Civil Justice:

> Right from the start, we have insisted that one of the main reasons for establishing the Institute is to bring some order and discipline to a code of professional ethics which seem to have grown like mushrooms to the chaotic back alleys, closed door ghetto-based confusingly and mistakenly

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[273] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).

> so-called "arbitrations" which have the tendency to flourish. …The fact is that the Institute has managed to have a good number of its executives take and successfully complete the ADR Institute of Canada's approved courses in Arbitration law and its process.[274]

At a minimum, most participants believe that both mediators and arbitrators in family matters need to have knowledge of the legislation governing all aspects of Canadian and Ontario family law (such as the *Family Law Act*, the *Divorce Act*, the *Child and Family Services Act*, the *Children's Law Reform Act*, and the *Succession Law Reform Act*) as well as the *Arbitration Act* itself. In addition, most respondents believe that knowledge of the *Canadian Charter of Rights and Freedoms* should be mandatory for mediators and arbitrators. Respondents believe that the values articulated in the Charter ought to be mirrored in the policy choices government makes about the use of arbitration and other alternative dispute resolution mechanisms.

Many of those concerned about family law mediation and arbitration spoke of the need for mediators and arbitrators to also be educated about the dynamics and risks of family violence. Dr. Barbara Landau, a lawyer, psychologist and mediator, wrote to the Review with the following detailed recommendation:

> I believe that all Mediators and Arbitrators need a minimum of a Basic Training in mediation and arbitration skills, Canadian Family Law and screening for Domestic Violence. If a contract is reached under duress – it is not valid. Mediators now MUST screen for Domestic Violence and assess both men and women for appropriateness for this process. The Standards set by OAMF [Ontario Association of Family Mediators] or Family Mediation Canada, and the Arbitration Institute of Ontario would be a suitable base with some modification in the curriculum to meet the special requirements of these mediators and arbitrators. This would NOT be specific to any religious group, but rather would teach Mediation principles and skills and the law related to Arbitration, Family Law and a minimum of 2 days of training in Domestic Violence and Power Imbalance.[275]

Some respondents advocated for mandatory membership in one or another of the professional associations that have formed over recent years to set standards for mediators and arbitrators; at the present time, such membership is entirely voluntary. These professional groups include Family Mediation Canada, the ADR Institute, the Ontario Association of Family Mediation, the Association for Conflict Resolution, and the Arbitration Institute of Ontario, among others. Conditions of membership in these groups include meeting specific standards of education and training as well as acceptance of the code of conduct developed for the profession. Others believed that specific professional qualifications, such as a law, social work or psychology degree, would be sufficient, especially if the person were a member of a self-regulating profession. Still others wanted the Review to recognize and acknowledge that the extensive religious training of Rabbis and some Imams qualifies them to mediate and arbitrate in a faith-based context.

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[274] Submission of Syed Mumtaz Ali, 'An Update on the Islamic Institute of Civil Justice' (August 2004).
[275] Submission of Dr. Barbara Landau (September 6, 2004).

Several respondents pointed out that the government of Ontario has established qualifications for those practicing court-based mediation, and that this is an acknowledgement that there must be minimum standards for education and training where government-funded services are provided. It may be worthwhile to outline these standards; in its Request for Proposals for Family Mediation and Information Services to be provided at Unified Family Court locations, the Ministry requires the following of its transfer payment agencies:

(a) Education, training and experience
The Service Provider shall ensure that, at a minimum, mediators have the following education and family mediation training and experience:

1) a professional degree or equivalent (significant directly related experience);
2) a minimum of 60 hours of training in family mediation (a basic and advanced level course); and
3) a minimum of 100 hours of supervision and/or a minimum of five cases mediated to the point of agreement where a practicing/accredited Ontario Association for Family Mediation (OAFM) mediator, or a Family Mediation Canada (FMC) certified mediator, has provided supervision and/or consultation.

Mediators who provide proof of their accreditation by the OAMF, or proof of their certification by FMC, will be deemed to have met the above-noted family mediation training and experience requirements.

(b) Knowledge, skills and other personal attributes
The Service Provider shall ensure that mediators also have the knowledge, skills, abilities and other personal attributes outlined below:

Knowledge

1) negotiation, conciliation, conflict management and the mediation process;
2) family dynamics and child development;
3) law pertaining to the issues being mediated, including:
    - the legal steps involved in separation and divorce;
    - major trends in the case law relating to the issues referred to above; and
    - the laws which can assist and protect women who have been abused;
4) the effects of separation and divorce on parents, children and the extended family;
5) in-depth understanding of the sources of power imbalances in relationships and an ability to recognize the indicators of such imbalances on their Clients;
6) where mediation proceeds, knowledge about the techniques used to redress power imbalances while remaining impartial;
7) indicators of domestic violence/abuse;
8) procedures and instruments to screen for abuse before and during mediation;
9) safety planning requirements and procedures for Clients and staff;
10) community and educational resources for referral outside or for use within the mediation process;
11) alternative conflict resolution options;

12) current public concerns regarding mediation practice; and
13) multicultural issues in dispute resolution.

Skills

1) advanced communication and relationship skills;
2) advanced investigative, interviewing and assessment skills;
3) demonstrated case management skills;
4) ability to assess the degree of the power imbalance to determine whether mediation is an appropriate option;
5) ability to use techniques to redress power imbalances;
6) mediators doing comprehensive mediation must understand and the be able to work with various financial documents which may be relevant in a case involving support or property issues (e.g. court financial statements, budgets, financial statements prepared by accountants).

Personal Attributes

1) non-directive, non-judgmental nature, respects Client's autonomy;
2) warm and empathetic;
3) ability to be firm and assertive;
4) ability to employ effective dispute resolution skills;
5) sensitivity to cultural differences;
6) ability to work within a specific timeframe;
7) professional judgment;
8) flexibility;
9) ability to be calm, level-headed, caring in the face of hostility and tension;
10) problem-solving skills and ability to be clear, creative, imaginative;
11) intuition and perception;
12) sensitivity to issues of domestic violence;
13) patience.[276]

Some participants expect that all these requirements should be met in private dispute resolution services, including both mediation and arbitration, and not just those provided as government-funded services.

While the tasks of mediators and arbitrators are similar, arbitrators have the capacity to make binding decisions, not merely to facilitate the parties' reaching an agreement which then goes to court for confirmation. Many respondents believe it is essential for arbitrators to have a number of additional qualifications beyond those required for mediators. They believe that arbitrators must understand and be able to apply the rules of evidence, as set out in Canadian law. In addition, they believe arbitrators must be skilled in writing decisions, so that these decisions and the reasons for them are clearly understood, if not agreed upon, by the parties to the dispute, and, in the event of an application for court review, the court hearing the matter. Above all, they maintain that arbitrators must be able to ensure "fair and equitable" process to the parties, as this is understood in a Canadian context.

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[276] Ministry of the Attorney General of Ontario, *Request for Proposals for Family Mediation and Information Services at the Family Court of the Superior Court of Justice* (Queen's Printer for Ontario, December 2003).

Some participants argued that there should be "equivalencies" of education and experience recognized where arbitrators have undergone extensive training in the law. The submissions from the *Beis Din,* included information about the extensive training judicial Rabbis receive prior to conducting arbitrations. These submissions made a strong case that additional training is not required where such qualifications have already been achieved.

> There are 2 qualifications that we require for our regular arbitrators. They must be ordained Rabbis and they must have the specific higher ordination for Rabbinic Judges.
>
> The normal Rabbinic training requires years of study. Beginning in grade school and on through Jewish high School, the Talmud is studied in great depth, much of this study being in the area of torts and legal procedures. In order to enter a Rabbinic ordination program, a person must have at least four years of post high school Talmudic study. This may vary slightly amongst the different Rabbinic programs, but rarely is it less than 4 years post high school. This study focuses mostly on Talmudic law. The Rabbinic ordination program is usually an additional 4 years.
>
> This Rabbinic ordination does not qualify one to be a Judge, though the bulk of the 8 years of post high school would have been in Talmudic law.
>
> To be admitted for the course to be a *Dyan*, or Rabbinical Judge, one is required to have the regular Rabbinic ordination. The course to be a Judge is a minimum of 2 additional years, often 4 or 6, depending on the particular Rabbinic school.[277]

Similarly, many felt that lawyers and judges, who have trained and practiced in Ontario, have sufficient education, knowledge and skill to conduct mediation and arbitration without additional training.

The Islamic community, by contrast, expressed significant concerns about how to ensure that those arbitrating according to Muslim personal law have sufficient knowledge and skill to do so effectively. Participants in the Review expressed deep misgivings about the very small number of Muslims who are expert in Muslim jurisprudence and are available to arbitrate. Commentators were equally concerned that, as a result, decisions may not be based on a clear understanding of Muslim law. Dr. Mohamed Elmasry of the Canadian Islamic Congress was quoted in an article in the Pakistan Daily Times in August of this year:

> Elmasry had said, "There are only a handful of scholars in Canada who are fully trained in interpreting and applying Sharia law – and perhaps as few as one." He had also said, "The arbitrators use gut feeling, they use common sense, and in

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[277] Submission of Rabbi Reuven Tradburks (September 2, 2004).

> many cases they are successful," in that their decisions are not appealed in a court or overturned.[278]

Faisal Kutty, a prominent Toronto-based Muslim lawyer, has also highlighted the lack of formal qualifications to interpret Islamic law:

> As it stands today, anyone can get away with making rulings so long as he has the appearance of piety and a group of followers. There are numerous institutions across the country churning out graduates as *alims* (scholars), *faqihs* (jurists) or *muftis* (juris-consults) without fully imparting the subtleties of Islamic jurisprudence.[279]

The Islamic Council of Imams – Canada made the following points:

> In order for someone to be an Islamic Judge *(Quadi)*, one requires extensive training in Islamic Jurisprudence. Besides this knowledge, his/her Character and Intelligence should also be superior. Unlike Ontario Judges, there is no formal accreditation, appointment, nor hierarchal relationship between certain decisions in the Canadian Muslim community.
>
> …Since Muslim family laws are not entrenched in the legal system in Canada, our Courts and ADR tribunals have little to go with and how these tribunals are going to implement their decisions, which is not accepted and if they are in violation of legal system, can be subject of litigation.
>
> Lack of standards for ADR tribunals, poses a serious problem for faith-based Tribunals. Moreover 90% of the rulings in Islamic matters can be discretionary, depending upon the circumstances.[280]

The Islamic Council of Imams proposed a Provincial Task force to "study and develop Canadian Muslim Family Law, to be used as basis for ruling by ADR Tribunals,"[281] suggesting that building an agreed body of law would be the first step in ensuring qualified arbitrators are available to the community.

The Council on American-Islamic Relations – Canada (CAIR-CAN) envisioned a government initiative to ensure adequate education and training:

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[278] 'Sharia debate rages on in Canada' *Pakistan Daily Times* (23 August 2004).

[279] Faisal Kutty, 'Canada's Islamic Dispute Resolution Initiative Faces Strong Opposition' Washington Report on Middle East Affairs (May 2004) 70, online: <http://www.wrmea.com/archives/May_2004/0405070.html>.

[280] Submission of Islamic Council of Imams—Canada, 'Islamic Arbitration Tribunals and Ontario Justice System' (July 23, 2004).

[281] Submission of Islamic Council of Imams—Canada, 'Islamic Arbitration Tribunals and Ontario Justice System' (July 23, 2004).

> The success of an arbitration system based on Islamic law will largely turn on the arbitrators. CAIR-CAN is confident that arbitrators equipped with the appropriate training and who have an understanding of both the spirit and the letter of Islamic family and personal law will render equitable decisions that are consistent with the *Charter of Rights and Freedoms*. Accordingly, it is our position that significant efforts must be taken by the Ministry, in partnership with minority communities, to select and train qualified arbitrators. The status quo of allowing for the creation of private arbitration systems with little to no government involvement in the selection and training of the arbitrators does not adequately protect the interests of individuals who, for religious or other reasons, choose this form of dispute resolution.
>
> It is our position that any institute or organization intending to offer faith based arbitration ought to submit to the Ministry of the Attorney General the resumes of those candidates which the organization intends to appoint as arbitrators. In assessing whether such candidates are qualified to apply Islamic family law within a Canadian context, the Ministry needs to formally seek the advice of recognized Muslim scholars, leaders and activists within the Canadian Muslim community. Alternatively, the Ministry may turn to a recognized Islamic body within Canada such as the Fiqh Council of North America.
>
> It is also our position that arbitrators must meet minimum qualification standards in mediation and arbitration skills as well as have an understanding of Ontario's family and estate laws. In this regard, arbitrators would be required to obtain a certificate in arbitration and mediation and complete a set of basic Canadian law courses designated by the Ministry. [282]

Other respondents preferred to see the Muslim community itself, rather than the government, taking the lead in any such effort to ensure that arbitrators are properly trained and following appropriate standards of practice when Muslim family law is used.

Regulation of Mediators and Arbitrators

It was clear that most participants favour the regulation of mediators and arbitrators and asked the Review to urge the government to move in this direction. Consumer protection of the clients of mediators and arbitrators, with some mechanism by which clients could access a complaint procedure and get redress, seemed to be envisioned by most participants in the Review. In addition, most respondents felt that the educational and conduct requirements for mediators and arbitrators ought to be easily accessed by the public, so that parties considering mediation and arbitration understand the basic requirements of the profession.

However, there were a number of different models of regulation proposed. Many suggested either direct government regulation or the establishment of a self-regulating

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[282] Submission of Canadian Council on American-Islamic Relations (CAIR—CAN) (August 10, 2004).

"college" or "institute" created by legislation. Some mediators and arbitrators are already members of self-regulating professions, such as the College of Social Workers, the Law Society of Upper Canada, or the College of Psychologists, but may not be bound by their rules of conduct when acting as mediators or arbitrators. Clarification of their obligations under these existing regulatory bodies when they act as mediators or arbitrators is required and, if conduct is regulated by these existing bodies, additional regulatory measures may not be necessary.

As an interim measure, some suggested that membership in the ADR Institute, Family Mediation Canada or Ontario Association of Family Mediators be required, as these organizations already have set standards for training in the skills required for mediation and arbitration and have established codes of conduct. Many of the lawyers who responded indicated that, in addition to their legal training, they have qualified as mediators and arbitrators by taking courses recognized by the ADR Institute or other professional associations. Similarly, the majority of those who are not members of self-regulating professions, but who are providing mediation and arbitration services, have received formal training, have voluntarily joined professional associations, and consider themselves to be bound by the codes of conduct of those associations. Many believe that the voluntary professional associations ought to work together toward the development of a specific regulatory body designed for mediators and arbitrators only.

Most commentators recognize that the profession of mediation and arbitration is still not mature enough to expect immediate self-regulation to occur and that this should be set as a long-term goal. There was general agreement that the development of a full-fledged regulatory regime would take some time, as has been experienced with the lengthy negotiations around regulating health care professionals, social workers, and public accountants. To accomplish this goal, most recognize that government leadership would be required from the outset and that eventual legislation must be passed to establish such a body. Alternatives such as regulation under another existing institution, as has been proposed for paralegals by the Law Society of Upper Canada, could also be explored as part of the process. Most felt that eventual licensing of some kind is desirable so that mediators and arbitrators can be prevented from practising if found guilty of misconduct or incompetence.

Some participants representing faith-based mediators and arbitrators seemed to prefer that their religious bodies be responsible for the regulation of those working in their own faith communities. The Beis Din is responsible to the *Vaad Harabonim,* the Orthodox rabbinical body in Toronto; there is also the Toronto Board of Rabbis, which is a multi-denominational umbrella group representing Conservative, Reform and Reconstructionist Rabbis. Because of the specialized judicial training required to sit on the Beis Din, representatives of the Jewish community indicated some resistance to outside regulation.

> It is our view that the credentials of the acting arbitrators are best assured by a system of self-governance by each religious/cultural group and not through any state-imposed standardized training or government charter-granting authority.

> …Going beyond that [a certificate of Independent Legal Advice] to impose any standard level of training may indeed interfere with *Charter*-protected religious rights. It also would create a state-sponsored paternalistic and legislated attitude towards all Ontarians of faith who have a right to choose, after they have been given independent legal advice by the lawyer of their choice.[283]

Many of those responding from the Muslim community, envisioned a regulatory panel of experts from their own community, possibly appointed by the government, but responsible to the community. Mubin Shaikh of Masjid El Noor, commented:

> Islam is a very flexible system and can operate under any situation. If we are to promote harmony and freedom of religion, then it is upon us to develop a plan we can all be proud of and which we can show to the rest of the world as a prime example of how the best country in the globe can produce the most accommodating legal system by having a formalized, regulated, Islamic Tribunal. However, these regulations must come from within the faith community otherwise it will be viewed with contempt and will lack the ability to encourage the observance of everyone's rights. [284]

Others providing religiously based mediation and arbitration seemed to feel that requiring membership in a self-regulating regime representing all mediators and arbitrators would not interfere with their ability to work according to principles of faith.

The Ontario Federation of Indian Friendship Centres was concerned that the requirement for credentials and regulation would pose a serious barrier to the development of mediation and arbitration practices in Aboriginal communities.[285] For Aboriginal peoples these requirements would tend to ignore the wisdom and experience so important within their communities and tie the process to the "white man's system of justice," from which the community seeks relief. It seems likely that Aboriginal people might seek exemption, possibly on Constitutional grounds, from any general regulatory scheme developed and would prefer to control any process of regulation independent of other regimes.[286]

Fair and Equal Treatment

Many respondents acknowledged that Section 6 and Section 19 of the *Arbitration Act* require that the parties to arbitration are to be treated "fairly" and have an "equal" opportunity to present their case before the arbitrator. However, the Act itself does not specify what fair and equal treatment actually means or how it would be interpreted by the court if it were asked to review an arbitral award.

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[283] Submission of B'nai Brith, 'Review of the Arbitration Process in Ontario' (August 31, 2004).

[284] Submission of Mubin Shaikh, 'Shariah Tribunals and Msjid El Noor: A Canadian Model' (August 24, 2004).

[285] In this report the term "Aboriginal" is used to indicate the First Nations, Metis, and Inuit people.

[286] Submission of Ontario Federation of Indian Friendship Centres (August 23, 2004).

The Review heard from many participants that the testimony of women, in Muslim culture, is given only half the weight of the testimony of men and that this may be regarded as "fair" by many Islamic people, even though it would not be considered fair by most Ontarians.

The Coalition of Jewish Women for the Get expressed concern that Jewish women appearing before the Rabbinic courts are often not allowed to have representation or even to have a support person accompany them. Many women find the process intimidating and may have difficulty articulating their case clearly. The Coalition reported that some Rabbinic tribunals are reluctant to accept expert testimony, even in the form of affidavits, and may not take into account the effect of violence within the marriage when making decisions affecting children.

Some respondents suggested that there be a clear articulation, for instance in a regulation to the *Arbitration Act*, which defines some principles of fundamental justice that should guide the process of arbitration. These would include the right to know the opposing case, the right to equal weight of testimony, the right to be represented (if desired), and the right to present your case.

Record Keeping

Although the *Arbitration Act* requires that there be written decisions of arbitral awards, it does not specify any other record of the proceeding. Although some arbitrators maintain full files on the arbitrations they conduct, including records of evidence presented and proceedings, other arbitrators were clear that such records do not exist in their practices. Some faith-based arbitrations are undertaken in languages other than English and French; the Review heard that sometimes those who are parties to the arbitration may not understand the language being used and may not have access to interpretation and translation of documents. Even if records are kept by the arbitrator, the Review was told that there is no guarantee that parties will have access to those records, should an appeal be contemplated or launched. Many participants suggested that there should be regulations to specify what records must be kept, in what form, and for how long. A number of different elements were identified as essential to a full record of the arbitration and these are discussed below.

The Arbitration Agreement:

The key to arbitration is the agreement of the parties to settle their dispute in this way. As noted above, the issue of consent by the parties is of great concern to many respondents. At present, arbitration agreements need not be in writing; nor is there any requirement that the parties have signed the agreement themselves and that these signatures are witnessed. Arbitration agreements may have been reached in the distant past, prior to the dispute even being contemplated. Some arbitration agreements may have been executed when parties were not legally competent to sign them, either because of age or coercion. Most respondents agreed that the requirements for the arbitration agreement should be made clear either in legislation or regulation when family law and inheritance matters are being arbitrated. LEAF's submission states this need most succinctly:

> The agreement to arbitrate must be made contemporaneously with the breakdown of the relationship. This requirement is necessary to ensure that the arbitrations are consensual. A party who agreed to arbitration at the beginning of a relationship may feel differently at the time of breakdown. If the procedure is not consensual at the time when it is actually embarked upon, then it is not consensual at all. [287]

Most respondents urged the necessity for the arbitration agreement to be written, in the language understood by each of the parties, and witnessed by an independent person. They also felt that agreements should clearly indicate what, if any, rights under the *Arbitration Act* have been waived by the parties and what form of law has been agreed upon as the basis for arbitration. Some felt that regulations should prescribe the elements of the arbitration agreement. One respondent, Philip Epstein, included a copy of the standard agreement he requires parties to sign prior to entering into mediation or arbitration and that is included as Appendix VI.

Arbitration Awards

Although the *Arbitration* Act specifies that arbitration awards must be written, the parties can opt out of this provision. Even if an arbitration decision is written, the Act does not regulate the form and content of such awards. Most respondents advocated that awards should be in writing and must include reasons for the decision; otherwise, it is difficult for parties and their legal counsel to determine what course to take in contemplating an appeal. Arbitrators should specify what evidence they have considered and what weight they have accorded to each party's testimony and why. This is particularly crucial when Muslim law is being applied; the Review heard repeatedly from participants that, according to Muslim law, a woman's testimony is given only half the weight of a man's.

The Society of Ontario Arbitrators and Regulators has developed an extensive handbook and decision-writing continuing education courses to encourage the appropriate writing of decisions by arbitrators. Other professional organizations likewise provide training and education in this area. Respondents urging the regulation of arbitrators indicated that required education in decision-writing should be one of the mandatory elements of professional qualifications.

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[287] Submission of Legal Education and Action Fund (LEAF) (September 17, 2004).

Independent Legal Advice (ILA)

Some groups, such as FACT and Fathercraft, absolutely opposed the imposition of mandatory ILA. The Islamic Institute of Civil Justice thought ILA should be an option available only if the arbitrator finds it would be helpful to the parties. However, according to the vast majority of respondents, the most important element to safeguarding vulnerable people is the requirement that they have received independent legal advice prior to agreeing to arbitration at all. Most of the lawyers the Review consulted already require ILA as a pre-condition to arbitration. It is useful to repeat some of the arguments for ILA here, as they provided strong guidance to the Review as to possible changes to the arbitration law. Again, LEAF's submission is helpful:

> It must be a requirement of the Arbitration Act that the parties to family law disputes obtain advice prior to agreeing to arbitrate. That advice must include information about the choices of procedure available for the resolution of disputes, and the rights and obligations that are imposed by Ontario family law. The Arbitration Act should also be amended to specify that parties may be represented by lawyers at an arbitration if they so choose.[288]

CAIR-CAN also recommended ILA as essential in cases to be determined in a faith-based arbitration process:

> In order to ensure that the parties are entering into binding arbitration voluntarily, a number of proactive measures need to be taken. First both parties must receive independent legal advice regarding their rights before committing themselves to an alternative form of dispute resolution. Moreover, each institute, organization or firm offering arbitration services must inform participants in writing of their right to appeal the arbitration decision once rendered, and their right to challenge the arbitrator under s.13 of the *Act*. If each party consents, a declaration shall be signed stating that the parties have received independent legal advice, understand their rights under the *Act* and are voluntarily consenting to binding arbitration according to doctrinal law.[289]

The most thorough consideration of ILA and how it could be the key to safeguarding parties to arbitration was presented in the B'nai Brith submission.

> …it is our recommendation that the *Arbitration Act* be formally amended to require that all litigants obtain a Certificate of Independent Legal Advice, from a qualified member of the Law Society of Upper Canada in good standing, in the form that will be set out in the regulations of the legislation. The individual will be advised as to the rights he or she is foregoing under Ontario's family and inheritance laws, and the nature of the alternative legal system will be explained before entering into a 'foreign' arbitration process of dispute resolution. …

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[288] Submission of Legal Education and Action Fund (LEAF) (September 17, 2004).

[289] Submission of Canadian Council on American-Islamic Relations (CAIR—CAN) (August 10, 2004).

> Our suggested version of the certificate is very specific. It tells the Judge that the litigant [is] fully informed about the nature of the process and the alternative type of law and procedure that will be administered, as well as the benefit of the Ontario laws that the clients is foregoing.
>
> Some critics might suggest that a Certificate of Independent Legal Advice is insufficient to protect vulnerable litigants. In reality, lawyers consider these certificates very seriously. They are well aware that their insurance deductibles and professional standing are in question should a vulnerable spousal litigant later attempt to make a claim against the solicitor on the basis that she was not sufficiently apprised of the rights she was foregoing under any particular agreement. This is particularly so in cases of arbitration agreements that could affect rights of property, support, child custody and access. As a result, many solicitors reduce their advice to writing in order to protect their liability positions, or have their clients sign "waivers" when the clients sign agreements that contravene their advice. [290]

The B'nai Brith submission included a model certificate of Independent Legal Advice for both family law and inheritance matters (See Appendix VII). B'nai Brith went on to suggest:

> It is further recommended that the Certificate of Independent Legal Advice contain a specific clause making full and frank disclosure of all financial matters mandatory before any religious court, notwithstanding any prior agreement entered into by the spouses under Part IV of the *Ontario Family Law Act,* R.S.O. 1990, c.F3, in compliance with section 56 (4) thereof (see paragraph 5 of the recommended Certificate in Appendix VII).
>
> The legislation should also provide that prior to any religious court ruling being enforced by the Ontario Superior court, the litigant will be required to complete and file an Affidavit of Solicitor as Subscribing Witness (see Appendix VIII), to which a copy of the solicitor's Certificate of Independent Legal Advice will be attached as an exhibit. It would then be within the Court's discretion to either immediately grant the enforcement order, or schedule a full hearing to investigate the circumstances regarding whether or not the litigant's participation in the religious arbitration hearing was truly voluntary. This process will further ensure that it is the free and voluntary decision of a litigant to enter into the arbitration process.
>
> An analogous process now occurs when parties with dependent children apply for a divorce under the *Divorce Act.*[291]

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[290] Submission of B'nai Brith, 'Review of the Arbitration Process in Ontario' (August 31, 2004).

[291] Submission of B'nai Brith, 'Review of the Arbitration Process in Ontario' (August 31, 2004).

The National Association of Women and the Law argued that ILA may not be the protection it is claimed to be:

> Moreover, it is unlikely that a lawyer would agree to represent a client at a tribunal that employs religious law because currently, the standard liability insurance provided by the Lawyers' Professional Indemnity Company, the insurance carrier for the Law Society of Upper Canada (members of the Ontario bar), does not cover lawyers acting in any area except Ontario/Canadian law.[292]

When discussing arbitration before the *Beis Din,* a Toronto lawyer notes:

> When it comes to Jewish law, Canadian lawyers really don't know anything. But even those who do know some *halacha*…[it] would be negligent to go before the Beis *Din* and argue Jewish law, since they are not covered for it in their insurance policy. If they made a mistake with financial repercussions, they could be personally liable.[293]
>
> Thus despite its recognized utility, in practice, independent legal advice may be of little use to clients who submit to arbitration using an alternative legal framework; this is so because most Ontario-trained lawyers are likely to be unaware of the repercussions and consequences of a system of law that they are not familiar with. Lawyers may only be of assistance to clients to the extent of explaining their rights in the Canadian legal context.[294]

Legal Aid Assistance

Even those respondents who enthusiastically endorse the notion of independent legal advice recognize that there may be financial barriers to obtaining that advice for vulnerable people. Most who recommend ILA also advocate that legal aid be available to those choosing arbitration to resolve family disputes. LEAF made the following recommendation:

> Legal Aid certificates or some other form of public funding (e.g. duty counsel) must be available to enable all parties to obtain independent legal advice and to be represented by lawyers in family law arbitrations. Funding must also be

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[292] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004) citing interview with a corporate counsel of the Lawyers Professional Indemnity Company (June 16, 2004).

[293] John Syrtash quoted by Lynne Cohen, 'Inside the Beis Din' *Canadian Lawyer* (May 2000) at 30 cited in Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).

[294] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).

> provided to fund family law arbitrators (not religious arbitrators), so that all parties have the option of having Ontario Family Law arbitration, if this is their choice.[295]

B'nai Brith stated:

> Religious-based court system offers litigants the opportunity to settle disputes at considerably less cost than the Ontario court-based system. In order to best protect vulnerable and economically marginalized litigants, it is advisable that Legal Aid be made available to the voluntary participants in the arbitration system. …Consideration should also be made to expanding Legal Aid to permit the issuance of Legal Aid certificates when arbitration is used as an alternative form of dispute resolution in family law cases, whether before religious courts or other private arbitrators, as a means to reduce the cost of resolving family law disputes.[296]

Arbitration Agreements and Awards Subject to the Family Law Act (FLA)

Many respondents advocated that arbitration agreements and awards should be subject to the Ontario *Family Law Act*. In particular, if arbitration agreements are included as one of the forms of domestic contracts covered in part IV of the FLA, many of the important protections of the FLA, such as full disclosure of financial assets and liabilities, come into force. Many felt that arbitration decisions that do not follow the FLA should not be enforced by the courts. LEAF argues that bringing family law arbitrations under the FLA answers some of the *Charter* concerns raised by women activists:

> LEAF's objection is not the use of religious precepts to resolve disputes, *per se*, but to the fact that the current *Arbitration Act* effectively gives these principles—which are not reviewable under the *Charter*—the force of law. The state is required to protect and promote women's equality, and it has done so through the Ontario Family Law regime. Women may choose to opt out of this protection, but the state abrogates its *Charter* responsibility if it agrees to enforce such contracts. It is trite law that parties are not entitled to contract out of human rights legislation, and the state likewise cannot say to women, "we will protect you, but only if you want to be protected". This is directly contrary to the basic principle that the *Charter* is the supreme law of the land and must be upheld by the government in all instances, regardless of the desires of a specific individual or even a democratically elected legislature. LEAF submits that the *Arbitration Act* cannot be used as a backdoor way of giving *Charter*-proof principles legal effect. Only the Ontario Family Law regime can be reviewed for compliance with the Charter, so only this regime can be given effect by the state.[297]

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[295] Submission of Legal Education and Action Fund (LEAF) (September 17, 2004).

[296] Submission of B'nai Brith, 'Review of the Arbitration Process in Ontario' (August 31, 2004).

[297] Submission of Legal Education and Action Fund (LEAF) (September 17, 2004).

Some respondents suggested that there need to be changes to the *Family Law Act* to include an explicit requirement for independent legal advice and to ensure that consent to arbitrate was not obtained under duress. Others requested that the *Family Law Act* be amended to guarantee substantive equality in arbitration and settlement agreements.

Again and again, members of the Muslim community assured the Review that Muslims who live in countries not governed by Islamic law are required by their faith to be obedient to the law in place in their country of residence. When pressed by the Review, even the Islamic Institute of Civil Justice has consistently stated that arbitration under Muslim family law would still have to accord with Canadian and Ontario law. When specifically asked if the inclusion of arbitration under Part IV of the FLA would pose difficulties, most indicated that, if that were the decision and became the law, it would be followed in religious arbitrations. Others stressed the importance of effective regulation to ensure that those not following the law would not be allowed to continue to arbitrate and that those damaged by a failure to apply the law would have some recourse.

Widening the Grounds for Appeal or Review of Arbitration Decisions

Many participants expressed concerns about the restrictions on the right to appeal included in the *Arbitration Act*. Others pointed out that the *Arbitration Act* allows parties to waive their appeal rights and that some arbitrators routinely include a provision that the parties waive all rights to appeal; they cannot waive their rights to judicial review. Some respondents, like LEAF, urged that parties not be allowed to waive their right to appeal on any grounds:

> Parties must not be allowed to waive the right of appeal under the *Arbitration Act*. This protection is required in order to make sure that decisions can be reviewed, if desired, for compliance with Ontario family law. Finality of decisions should be provided through strict timelines for appeal and there should be a mechanism to challenge appeals that appear to be frivolous or abusive.[298]

Some respondents feared that the benefits of arbitration would be lost if appeal rights were expanded. In particular, as noted above, FACT and Fathercraft both urged that appeal rights be narrowed, particularly with respect to child support guidelines and spousal support. These were the very areas on which proponents of expanded appeal rights put emphasis, pointing out that the potential for the impoverishment of women and children through unequal support provisions under religious law is the most serious possible outcome of allowing arbitration under these regimes.

Some respondents advocated a mechanism whereby courts could refuse to enforce decisions that ran counter to public policy, citing the ability of French and German courts to set aside family law agreements, made under religious laws, if these agreements are found to contravene "public order." Ouahida Bendjedou, an exchange student to the Osgoode Hall Law School from France, urged that

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[298] Submission of Legal Education and Action Fund (LEAF) (September 17, 2004).

> The arbitration agreement could provide an appeal which would lie on the ground that the decision conflicts with public policy in Ontario.[299]

Central Repository for Arbitration Decisions

One of the most urgent issues arising out of the Review is the need for some mechanism of oversight. The government's lack of information about the extent to which arbitration is used in family law and inheritance and how this mechanism has impacted vulnerable people was a major issue raised by virtually everyone responding to the Review. There is no repository to which arbitral awards must be sent and no reporting of cases; as a result, unlike court-based decisions, there is no way to track trends in decisions, no way to ensure that vulnerable people are not being disadvantaged as a result of choosing this dispute resolution method and no way for parties choosing arbitrators to know a potential arbitrator's "track record".

LEAF made the following recommendation:

> It should be mandatory to deposit all family law arbitration decisions (anonymized) with a central registry. All arbitration decisions must be required to include a statement of the issues in dispute, a concise description of the evidence tendered and a determination by the arbitrator, with reasons. The purpose of the registry would be to enable parties access to prior decision of arbitrators, and also to enable ongoing monitoring of the benefits and hazards of arbitrating family law disputes.[300]

The Islamic Society of Toronto envisioned strong government oversight.

> The Proposed…Tribunal shall require to formally register with the Ministry of the Attorney General under the Arbitration Act of Ontario. Minister of Attorney General shall have a commission similar to that of a "Human Right commission" comprised of Lawyers, Muslim community Leaders and Islamic Scholars who shall be capable and empowered to review any complaints filed within the intent of the act, understanding of Sharia laws and Canadian constitution.[301]

A more detailed scheme was included in the submission from CAIR-CAN:

> In addition to ensuring voluntary participation and qualified arbitrators, it is important to ensure that participants and their representatives are able to make informed decisions about the decision-maker in their dispute. The *Arbitration Act* allows the parties to specify the individual that will arbitrate their dispute but does not provide for a framework whereby an individual arbitrator's previous decisions

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[299] Submission of Ouahida Bedjedou (September 2004).

[300] Submission of Legal Education and Action Fund (LEAF) (September 17, 2004).

[301] Submission of Islamic Society of Toronto (August 31, 2004).

> can be reviewed and studied. This is particularly troublesome in the case of religious arbitration where the application of religious law can vary widely between religious scholars and schools of jurisprudence.
>
> CAIR-CAN recognizes that one of the advantages of the private arbitration of disputes is the confidentiality of the proceedings and the outcome. Nevertheless, it will only be possible for participants to make informed decisions about particular arbitrators and arbitration centers if there is a mechanism for gaining access to past decisions, which, under the *Arbitration Act*, must be made in writing.
>
> CAIR-CAN recommends the institution of a Registry of Ontario Arbitral Decisions ("Registry"). Essentially, every registered arbitrator would be required to provide a 'sanitized' copy of their decisions to the Registry within 1 month of the decision being rendered. Naturally, all confidential information must have been removed prior to the submission to the Registry. An index to and the text of the decision in the Registry would be made available to the public online or in paper form on request.[302]

The Islamic Council of Imams—Canada, recognizing that most of the concern with respect to arbitration was directed at Islamic personal law, expressed a willingness for oversight of Muslim arbitration decisions, even if other decisions were not being similarly monitored. As an interim measure, they proposed that:

> A five-member team be established as a pilot project to monitor decisions of the tribunals. The members of this team should comprise of:
> - Two Muslim lawyers, one female and one male;
> - Two Muslim qualified Scholars from two major sects, one Sunni and one Shi'a;
> - A Judge or legal expert from Attorney General's office.
>
> Our Council's Coordinator, Imam Abdul Hai Patel, offers his services in his capacity as Human Rights commissioner to the panel to ensure compliance with the Human Rights Code of Canada.
>
> The panel should be empowered to:
> - Approve establishment of tribunals;
> - Monitor their decisions; and
> - Assist the Judges in the Appeal process.[303]

While other respondents in the Muslim community agreed that there should be Islamic-based oversight, some were quite sceptical about having the oversight body under the auspices of the Council of Imams, voicing concern that this model might not provide a broad enough perspective to gain the community's confidence in the process. Alternatively, Wahida Valiante of the Canadian Islamic Congress suggested an oversight body, widely representative of the Muslim community, composed equally of men and women, and including the expertise of lawyers, social workers, psychologists, and others working on specific issues, such as violence against women, within the Muslim community.

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[302] Submission of Canadian Council on American-Islamic Relations (CAIR—CAN) (August 10, 2004).

[303] Submission of Islamic Council of Imams—Canada, 'Islamic Arbitration Tribunals and Ontario Justice System' (July 23, 2004).

Another variation on the theme of oversight was the suggestion that the law be amended to make all arbitration awards in family law matters, and in particular in religiously-based arbitrations, advisory only. In this way, like separation agreements or divorce settlements, arbitration decisions would be scrutinized by the court in a routine manner.

Ongoing Review of Family Law Practice in Arbitration

Many respondents suggested that, once arbitration decisions are collected, there should be regular reviews of the results. LEAF proposed:

> There should be a mandatory review of registered decisions on a periodic basis. After two reviews, there should be a report on the extent and nature of family law disputes being arbitrated, on compliance with Ontario family law, and on possible concerns for vulnerable women. The review should include consultation with potential stakeholders, including representatives of a diverse range of women's groups. Recommendations for change should include recommendations about the requirement for further review or study. [304]

Public Education and Community Responsibility

During the Review, many participants commented on the apparent lack of awareness and understanding of Ontario and Canadian law among the general population, specifically with respect to family law issues. While this lack of knowledge is of great concern in the court-based system, it becomes even more acute when parties are considering the use of arbitration under some other form of law. Many asked how parties can "choose" one law over another when they may not have accurate and complete knowledge of how either law may impact their future lives. Preeya Rateja, a member of the Muslim Police Consultative Committee, echoed the sentiments of many other respondents in stating,

> The participants, as well as the public at large, should be made aware through education and clear language, about the arbitration process and any other options that can be made available to them. Specifically, this knowledge will empower women who have been abused and children who have been exposed

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[304] Submission of Legal Education and Action Fund (LEAF) (September 17, 2004).

> to woman abuse, to make more informed decisions about their lives. The public also benefits from this knowledge as it helps remove myths and/or any misconceptions about this process.[305]

It is important to acknowledge the efforts that have been made to inform the public of their rights and responsibilities under Ontario family law. The Ministry of the Attorney General, with assistance from the Department of Justice Canada, has developed an excellent resource booklet, entitled "What You Should Know About Family Law in Ontario"; many respondents were familiar with this resource but pointed out that it is only available from the government in English and French and may not be distributed evenly in all communities. Although this guide does discuss the mediation process, the option of arbitrating family law issues is not mentioned, much less explained. The Ministry has also developed Family Law Information Centres in family court locations, in an attempt to ensure that those requiring information have an accessible and reliable source available in the courts themselves. Again, these services are provided in English and French but may not be able to be provided in the multitude of languages now used by our increasingly multicultural community.

Similarly, organizations such as Community Legal Education Ontario (CLEO), the Barbra Schlifer Commemorative Clinic, and other legal clinics have worked hard to develop written educational materials and to distribute these widely. Most of the educational resources available focus on criminal law or on such administrative law areas as housing, social assistance or workplace injury tribunals. The legal clinics often work in conjunction with other community service organizations, in particular settlement, English-as-a-second-language, and violence against women services, to provide public information sessions that are culturally sensitive and meet the wide range of legal questions that may arise. Nevertheless, many respondents pointed to the obvious lack of accurate and publicly available legal information on family law matters in languages other than English and French and in accessible formats for those facing specific communications challenges as a serious problem for most vulnerable and marginalized people in our society.

Although there was some unanimity in identifying the problem of lack of knowledge around family law issues, there was little agreement on the best method to resolve it or where the responsibility should lie for remedying the problem. Some respondents stressed the value of a general public legal information campaign, while others concentrated on delivering information to specific vulnerable groups. Some believe the education needs to happen at the time a family law issue arises and the parties are considering their options around dispute resolution, putting the onus on lawyers to ensure that clients understand the impact of their choices. Others believe that specific communities, wanting to advocate for religiously based arbitration, should be responsible for ensuring that all members of the community have access to the specific information required to meet their individual needs. Some favour written materials, while others advocate for multi-media approaches.

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[305] Submission of Preeya Raeja (August 20, 2004).

Many commentators told the Review that government has a responsibility to develop and deliver public legal education materials to generate awareness, to inform citizens of their legal rights and obligations and to ensure access to the services and resources available in the province. All respondents were concerned about the cost implications of effective educational efforts and most looked to government as a source of funding. However, participants were clear that government cannot and should not act in isolation. They suggested that government should take a leadership role in providing a platform to bring together all interested groups and community organizations to assist in the development of appropriate resources. Government can help communities increase their capacity through respectful partnerships. Respondents felt that government-community partnerships are necessary to ensure that public education material is accurate, accessible, gender sensitive and culturally appropriate.

Such a model would likely require some changes to the funding programs currently in place. Many commentators were critical of the way funding criteria affect their ability to access public education assistance. In particular, many felt, given their past experience, that funding through the Ontario Women's Directorate or the Victim's Justice Fund may not be available to them if they wish to provide education in a non-gendered way or through a religiously-based organization. Several Muslim respondents indicated that efforts focussed only on women and coming from a feminist perspective might exacerbate some of the tensions around gender roles within their communities.

The Review heard from a number of community-based groups that are already providing educational services around religiously-based mediation and arbitration. Earlier I provided extensive information on the Ismaili Conciliation and Arbitration Boards and the Masjid El Noor mediation and arbitration services, both of which have made education about the options and the process paramount to the provision of their services within their communities. Many respondents believe that those offering the services have the primary responsibility to ensure that their clients are fully informed of their rights and responsibilities under both Ontario and the religious law to be used; some felt that this responsibility should be included in regulations.

Most of the religious leaders advocating for religiously-based arbitration recognize that education is essential if parties are to have real choices with respect to dispute resolution mechanisms. They tended to suggest that the religious leadership needs to accept the primary responsibility for education. Although there was an expressed willingness by most advocates to provide such education, there were concerns about building expertise and finding resources to ensure excellence in the information to be given. Some respondents were fearful that the information produced by religious leaders might be one-sided, forcing community members toward a particular path, as opposed to ensuring informed choice. Others were concerned that some leaders in the community may act as gate-keepers to educational resources, using their power to block information about the possible drawbacks to mediation and arbitration.

It appears from the responses to the Review that a collaborative approach, involving many facets of the community, would likely be the most effective approach to public education. During the Review, I met a number of dedicated groups and individuals already taking a leading role in informing members of their faith communities about their rights and the services available to them.

One of these groups, the Canadian Coalition of Jewish Women for the Get[306] was formed in 1988 to "reach as many Jewish people as possible in order to explain the need for a GET (Jewish religious divorce), to expose the misuse of Jewish law as a tool for extortion and emotional abuse, and to find the means for victims of GET abuse to be freed."[307] The group has developed a series of help lines, an information booklet, and an instructional video to inform Jewish women of all the options available to them under both Canadian and Jewish law. The materials explain the Jewish divorce process, what to expect at the Beit Din, and how a Jewish divorce differs from a civil divorce. The Coalition works to inform not only the Jewish community, but also the broader legal and social service communities, of the ways in which the potential problems which may be faced by Jewish women going through the *get* process can be alleviated. The Coalition was able build a strong movement to change the federal Divorce Act and the Ontario Family Law Act to prevent recalcitrant spouses from withholding the *get*. The group provides a strong role model to other women's groups concerned about potential abuses of religiously-based mediation and arbitration.

In the Muslim community, a number of groups are already in existence and providing support to the vulnerable in their midst. The Review saw many examples of women working at the grassroots level to educate both the Muslim community and the general public about Islam and to promote the collective well-being of their community. These women have been working for years with a variety of sectors, including social services, education, settlement agencies, media and faith-based organizations to enable them to provide better services to Muslim women, people with disabilities, new immigrants and refugees from diverse backgrounds. The Canadian Council of Muslim Women is one group that has worked hard since its inception within the various Islamic communities to enhance the role of women within the faith and to foster an understanding of the principle of equality so central to Islamic teachings. As I met with other groups, such as the National Organization of Immigrant and Visible Minority Women of Canada, the Ontario Council of Agencies Serving Immigrants, the Council of Agencies Serving South Asians, the Islamic Humanitarian Service, the Muslim Canadian Congress, and others, I was struck by the wealth of talent, knowledge and leadership available within the Muslim community.

On several occasions, respondents emphasized the importance of educational endeavours coming from within the affected communities. Ouahida Bendjedou observed:

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[306] The Coalition is comprised of several cross-denomination Jewish women's organizations, including Emunah Women of Canada, Hadassa-WIZO Organization of Canada, Jewish Women International of Canada, Na'amat Canada, National Council of Jewish Women of Canada, Status of Women Committee of the Canadian Jewish Congress, Toronto Jewish Women's Federation, Women's Canadian ORT, Women's Federation CJA, Women's League for Conservative Judaism.

[307] Norma Baumel Joseph, Evelyn Beker Brook, Marilyn Bicher, ' 'Untying the Bonds' Jewish Divorce: A GET Education Video and Guidebook' (The Coalition of Jewish Women for the Get, 1997).

> An important core work is necessary among the Muslim community. First Muslim women's education should be done by organizations which represent Muslim women in Canada (e.g. the Canadian Council of Muslim Women). By education I mean, first to teach them English, because a major reason of Muslim women's exclusion of Canadian society is that they don't know the language of the country they immigrated into; consequently, they remain dependent on their husband. Second, by education, I mean to teach them Islam in order for them to know what rights they own under Islam. [308]

At one meeting with a group of young Muslim women, participants felt strongly that the responsibility lies within their own community organizations and institutions to develop and disseminate information about rights, obligations and options with respect to family law. These young women felt insulted by the suggestion that Muslim women do not have the knowledge, strength and will to understand and take action to protect the vulnerable within their own communities. Several respondents pointed out that there are ongoing efforts to build connections within the Muslim community and to build consensus on issues affecting the community. One such organization, the Coalition of Muslim Organizations, is an umbrella organization of 35 Mosques and community agencies in the Greater Toronto Area and was seen as a possible vehicle for ensuring a community-based delivery of education about Muslim personal law and its interface with Ontario family law.

The Review sought out advice on how to identify best practices for the development and distribution of community legal education. Both CLEO and the Barbra Schlifer Commemorative Clinic were most helpful. Staff suggested that any public education strategy would be most effective if it incorporates the following elements:

- Defining and researching target audiences, and ascertaining the availability of existing written materials in relevant languages and formats; determining whether material is written in a culturally appropriate way, if the translations and legal information are accurate, and if the language is accessible.
- Development and delivery of a strategy of partnership with appropriate community agencies. Any agencies involved must have credibility in the community as well as an understanding of the issues that need to be communicated to the public. Champions within the community are also essential, as is the support of faith leaders or community elders who have a wide sphere of influence.
- Effective distribution plan to ensure that materials will be available in places that target audiences are likely to frequent. In the case of immigrant women, in particular, materials should be distributed to LINK programs, settlement agencies, ethno-specific agencies, community- based health clinics, skills training programs, including language training, faith-based institutions and mainstream organizations with programs that immigrant women may attend.

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[308] Submission of Ouahida Bedjedou (September 2004).

- Broad-based approach to media resources, including making use of language-specific radio, television and newspapers in ethno-specific communities in order to effectively reach wide audiences.

Section 8: Recommendations

This section sets out the Review's recommendations. Some of them call for changes to the governing legislation, some for regulation, some for general government oversight of the activities studied by the review, and some for public support of the interests of vulnerable people in our society. These changes are described in turn. They are listed in this order for thematic convenience but not to indicate a ranking of their importance.

I do not repeat here the detailed analysis that occupies the other sections of the Report. I will confine the text to a brief indication of the considerations that have been raised to the Review and of the factors that have led me to my conclusion.

The recommendations themselves are consecutively numbered through the different sections, from 1 to 46. A simple listing of the recommendations without commentary appears in the Executive Summary.

General

The Review did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues. Therefore the Review supports the continued use of arbitration to resolve family law matters. However, that use should be subject to the safeguards recommended below.

1. **Arbitration should continue to be an alternative dispute resolution option that is available in family and inheritance law cases, subject to the further recommendations of this Review.**

2. **The *Arbitration Act* should continue to allow disputes to be arbitrated using religious law, if the safeguards currently prescribed and recommended by this Review are observed.**

Legislative

Following are proposed changes to the *Arbitration Act* and the *Family Law Act* to make them better suited for family and inheritance arbitrations.

The issue of consent will be addressed in several parts: the identity and capacity of the person who consented to arbitrate; the timing of the agreement to arbitrate; the reality of the consent to the arbitral process; and the reality of the consent to the choice of a different law.

3. **Section 51 of the *Family Law Act* should be amended to add mediation agreements and arbitration agreements to the definition of "domestic contracts" to bring these agreements into the general protections of Part IV**

of the Act. Therefore these agreements would be required to be in writing, signed by the parties and witnessed.

4. **When Part IV of the *Family Law Act* applies, a mediation agreement or arbitration agreement should be able to be set aside on the same grounds as other domestic contracts.**

5. **Part IV of the *Family Law Act* should be amended so that if a co-habitation agreement or marriage contract contains an arbitration agreement, that arbitration agreement is not binding unless it is reconfirmed in writing at the time of the dispute and before the arbitration occurs.**

6. **The reconfirmation in writing should not be required for an arbitration conducted:**

    (a) under a separation agreement;
    (b) as a consequence of an award made in an arbitration that was itself agreed to contemporaneously; or
    (c) as a consequence of a judgment of a court.

7. **Section 55 (2) of the *Family Law Act* should be amended to require prior court approval of a domestic contract entered into by a minor in Ontario.**

8. **Section 33 (4) of Part III of the *Family Law Act*, permitting the Court to set aside a domestic contract or paternity agreement for provision of support, should be amended to permit a court to set aside an arbitral award on the same grounds (unconscionability, person owed support is receiving social assistance, or the support is in arrears).**

9. **The *Arbitration Act* should be amended to permit a court to set aside an arbitral award in a family or inheritance matter if:**

    (a) the award does not reflect the best interests of any children affected by it;
    (b) a party to it did not have or waive independent legal advice;
    (c) the parties do not have a copy of the arbitration agreement, and a written decision including reasons; or
    (d) applicable, a party did not receive a statement of principles of faith-based arbitration.

    The parties should not be able to waive this provision.

10. **The *Arbitration Act* or the *Family Law Act* should be amended to provide regulation-making powers for family law and inheritance arbitrations and to require the use of regulated forms and procedures.**

11. **The *Child and Family Services Act* s. 72 (5) should be amended to explicitly include mediators and arbitrators in the class of professionals who have an enforceable duty to report a child in need of protection.**

Regulatory

Some legal requirements are more suited to regulation than to legislation.

It is important that the parties have a full understanding of their circumstances and the implications of choosing arbitration.

12. **Regulations in the *Arbitration Act* or the *Family Law Act* should require that arbitration agreements of family law and inheritance cases must be in writing and must set out:**
    - **a detailed list of issues that are submitted to arbitration;**
    - **whether the arbitration is binding or advisory;**
    - **the form of law, if not Ontario law, which will be used to decide the dispute, and in the case of religious law, which form of the religious law;**
    - **if the arbitration is under religious law, an acknowledgement that the party has received and reviewed the statement of principles of faith-based arbitration prior to signing the agreement;**
    - **explicit details of any waiver of any rights or remedies under the *Arbitration Act*;**
    - **an explicit statement that judicial remedies under s. 46 and the right to fair and equal treatment under s. 19 of the *Arbitration Act* cannot be waived;**
    - **an explicit statement recognizing that judicial oversight of children's issues cannot be waived and that s. 33 (4) of the *Family Law Act* continues to apply; and**
    - **an explicit statement that s. 56 of the *Family Law Act* applies to the agreement and cannot be waived and therefore a party can apply to set the agreement aside for additional reasons including if it is not in the best interests of any children affected by the agreement, there was not full and frank financial disclosure, or a party did not understand the nature or consequences of the agreement.**

13. **Regulations in the *Arbitration Act* or the *Family Law Act* should require arbitration agreements in family law and inheritance cases to contain either a certificate of independent legal advice or an explicit waiver of independent legal advice.**

14. **Regulations in the *Arbitration Act* or the *Family Law Act* should require mediators and arbitrators in family law and inheritance cases to be**

members of voluntary professional organizations, or fall into an excluded class defined by the regulation, in order to have their decisions enforced by Ontario courts.

15. **Regulations under the *Arbitration Act* should define the concept of a fair and equal process in the context of family law or inheritance arbitrations.**

16. **Regulations in the *Arbitration Act* or the *Family Law Act* should require that arbitrators who apply religious law in family law and inheritance arbitrations develop a statement of principles of faith-based arbitration that explains the parties' rights and obligations and available processes under the particular form of religious law.**

17. **Regulations in the *Arbitration Act* or the *Family Law Act* should require religiously-based arbitrators to distribute their statement of principles of faith-based arbitrations to all prospective clients.**

The law of contracts and Part IV of the *Family Law Act* offer the option to set aside an agreement where there has not been true consent because the person was pressured or coerced into entering into an agreement. More subtle community pressure may not qualify as coercion for this purpose, whereas threats of violence from a partner or family member almost certainly would.

18. **Regulations in the *Arbitration Act* or the *Family Law Act* should require mediators and arbitrators in family law and inheritance cases to screen the parties separately about issues of power imbalance and domestic violence, prior to entering into an arbitration agreement, using a standardized screening process.**

19. **Regulations under the *Arbitration Act* or the *Family Law Act* should require mediators and arbitrators in family law and inheritance cases to certify that they have screened the parties separately for domestic violence, that they have reviewed the certificates of Independent Legal Advice or the waiver of Independent Legal Advice, and are satisfied that each party is entering into the arbitration voluntarily and with knowledge of the nature and consequences of the arbitration agreement.**

At present arbitrators are not required to keep any record of their decision, though they are to issue their decisions with reasons in writing, unless the parties state otherwise. This makes it difficult for a potential party to know whether a particular arbitrator has a prejudice or style of proceeding. It also hampers any investigation of the practice of arbitrating family law matters in the interests of public policy. This review certainly faced that challenge. To alleviate these problems, arbitrators should have to keep records and make them accessible. These recommendations are dealt with below; here is the regulatory sanction.

20. **Regulations under the *Arbitration Act* or the *Family Law Act* should state that if the records required by Recommendations 37, 38 and 39 are not maintained, a party can apply to have an arbitral award set aside.**

Independent Legal Advice

Almost all participants agreed that there was a need for Independent Legal Advice for those participating in a family or inheritance arbitration.

The challenge for the Review is to strike a balance between the clear need for additional information about the law and the arbitration process, and the fear that a requirement for Independent Legal Advice will make what is currently a useful and swift alternative to the court process more legalistic and time-consuming.

21. **The certificate of Independent Legal Advice in family law and inheritance cases should state that the party has received advice about the Ontario and Canadian law applicable to his or her fact situation, the law of arbitration, and the remedies available to both parties under Ontario family and arbitration law.**

22. **Arbitration services which conduct family law and inheritance arbitrations should distribute the statement of principles of faith-based arbitrations required under Recommendations 16 and 17 to potential clients, in advance of the clients seeing a lawyer.**

23. **If religious law is chosen under the arbitration agreement in a family law or inheritance case, the Independent Legal Advice certificate should explicitly state that the lawyer reviewed the statement of principles of faith-based arbitration and the lawyer is satisfied that the person has sufficient information to understand the nature and consequences of choosing the religious law.**

24. **Waivers of Independent Legal Advice in family law and inheritance cases should state that the party has waived the right to receive advice about Canadian and Ontario family law and Ontario arbitration law, and if religious law is chosen should state that the party has received and reviewed the statement of principles of faith-based arbitration required by Recommendations 16 and 17.**

Public Legal Education

Although commentators frequently cautioned the Review that pamphlets and other written information are not enough, all emphasized the need for useful, accessible information so vulnerable women, in particular, are aware of their legal options to resolve disputes.

25. **The Government of Ontario should develop, in collaboration with community organizations and experts, a series of public education initiatives, aimed at creating awareness of the legal system, alternative dispute resolution options, and family law provisions.**

26. **The initiatives in Recommendation 25 should be linguistically and culturally designed to suit the diverse needs of different communities, as well as any communications challenges faced by members of the community (e.g. blindness, deafness, etc.).**

27. **Any public education campaign that is developed should include, but not limit itself to, information on the following topics:**

    - **General rights and obligations under the law;**
    - **Family law issues;**
    - **Alternative forms of dispute resolution;**
    - ***Arbitration Act;***
    - **Immigration law issues; and**
    - **Community supports.**

28. **Public legal information programs funded by the government of Ontario should include an overview of the options for resolving a family law dispute, including the arbitration process.**

29. **Public legal information programs in family law funded by the government of Ontario should be available to all community members who wish to attend, whether or not they have a matter before the court.**

30. **Family Law Information Centres should provide information that has been developed by and for specific ethno-cultural communities and in community languages about their rights and responsibilities under Ontario and Canadian law.**

Training and Education for Professionals

Parties to arbitrations and mediations may not be aware of the professional competence (or its absence) of arbitrators or mediators they select to deal with their matters. There is no mechanism of quality control to ensure that the intent of the *Arbitration Act* in dealing expeditiously and fairly with family law matters is not being subverted and that serious inequities in the treatment of women and men under arbitrated decisions has not occurred over time.

The reality of regulation of professional services is that some combination of state, community and market regulation probably works best. The Review was very concerned that simply withdrawing all statutory support and limitation (i.e. by prohibiting arbitration in family law matters altogether), would limit people's options for resolving their disputes and might push the practice of religious arbitrations outside the legal system altogether, thus limiting the court's ability to intervene to correct problems.

31. **The Government of Ontario should work together with professional bodies to develop a standardized screening process for domestic violence for use in family law and inheritance mediations and arbitrations.**

32. **The Ministry of the Attorney General, the Law Society of Upper Canada and LawPro should strike a joint task force to examine the use of arbitration in family law and inheritance cases, to develop and deliver continuing education to lawyers about arbitration and Independent Legal Advice, and to examine the insurance and public compensation issues as they impact on the public interest.**

33. **The Government of Ontario should work with voluntary professional associations for mediators and arbitrators to provide training on issues of power imbalance in family law and inheritance cases, use of the prescribed screening process from Recommendation 18, and the process for an arbitrator to certify the material for a family law or inheritance case as required by Recommendation 19.**

34. **The guidelines of voluntary professional associations for training, conduct and competence of mediators and arbitrators should clearly explain their professional duty to report children in need of protection.**

35. **Voluntary professional associations for mediators and arbitrators should require that, in family law and inheritance cases, if mediators practice arbitration during mediation sessions, the agreement to arbitrate must precede the commencement of the mediation, and all the obligations of arbitrators under Recommendations 16, 17, 18 and 19 must be met before the commencement of any arbitration.**

Oversight and Evaluation of Arbitrations

One of the most urgent issues arising out of the Review is the need for some mechanism of oversight. The government lacks of information about the extent to which arbitration is used in family law and inheritance and how this mechanism has impacted vulnerable people. This concern was a major issue raised by virtually everyone responding to the Review.

36. **The Ministry of the Attorney General should work with professional organizations to review existing codes of professional conduct and assess whether they apply when a member of a profession conducts an arbitration or mediation.**

37. **Decisions of arbitrators in family law and inheritance cases should be delivered to the parties in writing and include a copy of the arbitration agreement, and any attachments required by the regulations. Decisions should include written reasons.**

38. **The arbitrator in family law and inheritance cases should maintain copies of the decision for a period of at least 10 years.**

39. **Arbitrators should be required to keep a record of each arbitration in family law and inheritance cases including the names of the parties and their representatives (if any), the arbitration agreement, the certificates or waivers of Independent Legal Advice, any documents filed by the parties, a summary of the facts of the case and the written decision. Copies of these files should be made available to the parties upon request. If an arbitrator does not maintain these files, or make the file available when requested, the arbitral decision may be set aside.**

40. **Arbitrators of family and inheritance matters should be required to report annually to the Ministry of the Attorney General, the following aggregated and non-identifying information:**

    - **Number of arbitrations conducted;**
    - **Number of appeals or motions to set aside and the outcome, if known (e.g. pending, award set aside, court refers back to arbitrator, etc.); and**
    - **Any complaints or disciplinary actions they are aware of that have been taken against them during that year by their professional body or the courts.**

41. **Arbitrators in family law and inheritance cases should be required to provide the Government of Ontario with summaries of each decision, free of identifying information, and the Government should make these summaries available upon request for research, evaluation and consumer**

protection purposes. If in the future arbitrators become a self-regulating profession, the inventory of summaries of decisions should be transferred to the regulatory body for that profession.

42. **Voluntary registration organizations should consider failure to make decisions available and file decisions in accordance with Recommendations 40 and 41 grounds for the deregistration of the arbitrator.**

Community Development

The government cannot, and should not, act in isolation in the delivery of public legal education materials. In order for the material to be accessible, gender sensitive and culturally appropriate, and to ensure that messages are not diluted, government-community partnerships may be an effective way of undertaking public education initiatives around arbitration and related issues. A collaborative approach involving many facets of the community will be the most effective public education strategy.

43. **The Government of Ontario should encourage and fund community organizations who run arbitration services to develop information materials about rights and obligations under religious law.**

44. **The Government of Ontario should encourage and fund community organizations to work with experienced public legal education providers and the legal community to research and develop effective public information materials which explain rights under Ontario and Canadian law in a way that is likely to be comprehensible to people of diverse backgrounds and culture.**

Further Policy Development

The review has made a number of recommendations to palliate the most urgent concerns about the use of arbitration in family and inheritance matters. This does not remove the need for longer-term solutions as well.

45. **The Ministry of the Attorney General should set a long term goal of professional self-regulation of mediators and arbitrators who deal with family law and inheritance cases. The Ministry should work with professional organizations including the Law Society of Upper Canada and voluntary mediation and arbitration organizations to develop a consultation process which will lead to guidelines for conduct and competency for these professionals.**

As we have seen, the FLA already treats the setting aside of any settlement which was negotiated in the context of the removal of religious barriers to remarriage in a unique way. Building on this concept, it may be possible for the government to provide a higher level of court oversight to settlements of family and inheritance cases that are negotiated based on religious principles. This is an area where I believe further study and analysis is required.

46. **The Ministry of the Attorney General should conduct further policy analysis of the legality and desirability of providing a higher level of court oversight to settlements of family and inheritance cases based on religious principles than is available to non-religiously based settlements under Part IV of the *Family Law Act* in addition to the several additional grounds set out in these recommendations under which arbitral awards may be challenged.**

APPENDIX I

Terms of Reference

Marion Boyd's Review of Arbitration Process

Marion Boyd has been asked to provide advice and recommendations to the Attorney General and the Minister Responsible for Women's Issues about the use of private arbitration to resolve family and inheritance cases, and the impact that the use of arbitration may have on people who may be vulnerable including women, persons with disabilities and elderly persons. The review will include consideration of religious based arbitrations.

Mrs. Boyd, with the assistance of government officials, will consult interested parties to determine their views. Mrs. Boyd will take into account the prevalence of the use of arbitration in family law and inheritance cases and other matters affecting vulnerable persons. To the extent that it may be necessary to understand arbitration processes Mrs. Boyd may choose to examine the use of other alternative dispute resolution models (mediation, collaborative law, separation agreements). She shall consider the safeguards which are available to participants in different dispute resolution settings, and in different jurisdictions. Mrs. Boyd will provide her best advice and recommendations, taking into account the position of interested parties and any consensus amongst those parties on any of the issues. However, Mrs. Boyd will not be bound by any consensus in the development of her advice and recommendations.

Mrs. Boyd's advice and recommendations will reflect the following principles:

- Governments and legislation are bound by the *Charter of Rights and Freedoms* and government action should respect *Charter* values;
- Safeguards for private dispute resolution should be consistent no matter which method is employed;
- Parties should participate in any alternative dispute resolution process voluntarily and not because of pressure or coercion from family members or community;
- The safeguards for separation agreements outlined in s. 56 of the *Family Law Act* are minimum safeguards;
- Final resolution must be subject to the best interest of any children in relation to their parenting, continuity of care and financial support;
- The court retains oversight over children and their care and support;
- Final alternative resolution of private disputes in accordance with the principles of fundamental justice may be preferable to litigation.

The review should encompass the following topics:

- The prevalence and use of arbitration in family law and inheritance cases;
- The current use of the *Arbitration Act, 1991* to enforce arbitral awards through the Ontario courts;
- Any differential impact the use of arbitration has on women, elderly persons, persons with disabilities or other vulnerable groups.

Mrs. Boyd will provide updates on the progress of the review to the Attorney General or the Minister Responsible for Women's Issues on their request.

Mrs. Boyd will submit a final report to the Attorney General and the Minister Responsible for Women's Issues summarizing the views that have been expressed and her recommendations and advice. This report will be in a form appropriate for release to the public, pursuant to the *Freedom of Information and Protection of Privacy Act*.

To contact the review:

Write: Arbitrations Review
C/O 11th Floor
720 Bay Street
Toronto, Ontario
M5G 2K1

e-mail: boyd.review@jus.gov.on.ca

Telephone: (416) 326-2500 and ask for Arbitrations Review

APPENDIX II

List of Participants

Marion Boyd spoke with the following people:

Name	Organization
Faduma Abdurahman	Catholic Immigrant Centre
Sheikh Faisal Abdur-Razak	Islamic Forum of Canada
Humera Abrahim	Canadian Council of Muslim Women
Ayesha Adam	
Allen Adel	B'nai Brith Canada
Mahmoud Ahmadi	Spokesperson for International Federation of Iranian Refugees.
Istar Ahmed	Dar-ul-Qada
Suad Aimad	Dar-ul-Qada
Margaret Alexander	Board Member, Ontario Association of Interval and Transition Houses (OAITH)
Anisa Ali	Islamic Humanitarian Service
Faizal Ali	
Harris Ali	
Surya Ali	
Syed Mumtaz Ali	Islamic Institute of Civil Justice
Tariq Ali	
Imam Shabir Ally	Islamic Dawa & Information Centre
Samy Appadurai	Toronto Police Muslim Consultative Committee
Sherry Ardell	Canadians in Support of Afghan Women
Furugh Arghavan	Activist of the Iranian Civil Rights Committee in Toronto
Homa Arjomand	International Campaign Against Shari'a Court in Canada – including 3318 Names on Petition
Zahir Bacchus	

Natasha Bakht	CCMW & NAWL Researcher
Ahmed Baksh	Canadian Islamic Congress
Hamid Bashani	Lawyer
Lise-Marie Beaudry	Executive Director, Oasis centre des femmes
Ouahida Benjedou	Intern, Shibley Righton LLP
Shirez Bharmal	National Conciliation and Arbitration Board of Canada
B. Husain Bhayat	Dar-ul-Qada
Anu Bose	National Organization of Immigrants and Visible Minority Women of Canada
Bill Brant	Ontario Federation of Indian Friendship Centres
Anita Bromberg	B'nai Brith Canada
Evelyn Brook	President, Canadian Coalition of Jewish Women for the Get
Janet Epp Buckingham	Director Law and Public Policy, Evangelical Fellowship of Canada
Katherine Bullock	Islamic Society of North America
Dominic Cardona	Filmmaker
Terrance W. Caskie	Christies, Barristers and Solicitors
Kamori Clarke	Yale University
Andrée Côté	Director of Legislation and Law Reform, National Association of Women and the Law
Ned Courtney	Family Mediation Canada
Elizabeth Cuddy	
Dekna David	Catholic Immigrant Centre
Kim Derry	Staff Superintendant, Toronto Police Service
Bonnie Diamond	Executive Director, National Association Women and the Law
Frank Dimant	B'nai Brith Canada
Gariborz Dorafshar	
Shahin Dorafshar	
A. Burke Doran	Doran and Mills, Barristers and Solicitors

Debbie Douglas	Executive Director, Ontario Council of Agencies Serving Immigrants (OCASI)
Diane Dupont	Action ontarienne contre la violence faite aux femmes
Majed el Shafie	Christian Legal Fellowship
Rabbi Edward Elkin	
Elka Enola	The Humanist Association of Toronto
Philip M. Epstein	Epstein Cole
Imam Adam M. Esse	Coalition of Muslim Organizations
Bibi Etrat	Iranian Lawyer
Jo-Anne Fan	Law Student (University of Ottawa)
Mary Lou Fassel	Legal Director, Barbara Schlifer Commemorative Clinic
Tarek Fatah	Host, The Muslim Chronicle
Rocco Galati	Counsel, Muslim Canadian Congress
Dada Gasibaro	Transitional support service worker, Oasis centre des femmes
Charles M. Gastle	Counsel, Shibley Righton LLP -Adjunct professor, Osgoode Hall, York University
Grant Gold	Chair OBA Family Law Section
Abass Goya	An active member of Women's Liberation
Moulana Habeeb	United Muslims
Khadija Haffajee	
A. Osman Haji	
Mahmud Hassan	Muslim Canadian Congress
Najjet Hassan	Canadian Council of Muslim Women
Valerie Hazlett-Parker	Member Christian Legal Fellowship
Uruzurum Heer	Council of North American Muslims
Mary Hernandez	Immigrant Women Services Ottawa
Alia Hogben	Canadian Council of Muslim Women

PC Hojt-Nijor	Toronto Police Muslim Consultative Committee
Sheila Holmes	Advocates Society
Sharon Hoosein	Acute Care Nurse Practitioner
Humera Ibrahim	Canadian Council of Muslim Women
Khayal Ibrahim	Co-chair, Organization Defending Iraqi Women's Rights
Abdul Ingar (and others)	Islamic Society of Toronto
Susan Jaco	National Council of Women of Canada
Rizwana Jafari	Muslim Canadian Congress
Razia Jaffer	Canadian Council of Muslim Women
Nuzhat Jafri	Canadian Council of Muslim Women
Nasrun Jami	
Brian Jenkins	Fathers are Capable Too (FACT)
Norma Joseph	Founder, Canadian Coalition of Jewish Women for the Get
Zohra R. Kalamadecu	Canadian Council of Muslim Women
Sharon Kan	Catholic Immigrant Centre
Nina Karachi-Khaled	Canadian Council of Muslim Women
Zul Kassamali	Association of Progressive Muslims of Canada
El-Farouk Khaki	Muslim Canadian Congress
Fouzieh Khalediyan	Committee to Defend Women's Rights in the Middle East-Canada
Afshan Khan	Catholic Immigrant Centre
Genghiz Khan	
Hasib Khan	Dar-ul-Qada
Mamuda Khan	
Mobeet Khan	Dar-ul-Qada
Mohammed Ayub Ali Khan	
Senghiz Khan	
Shah Khan	Dar-ul-Qada

Yasmin Khan	
Zeba Khan	
Rabia Khedr	Diversity Consultant
Shahram Kholdi	Law student, Masters Candidate, University of Toronto
Khalida Khurshid	
Ruth Klein	B'nai Brith Canada
Wendy Komiotos	Executive Director, Metropolitan Action Committee on Violence Against Women and Children (METRAC)
Mehdi Kouhestaninejad	Muslim Canadian Congress
Barbara Landau	Cooperative Solutions
Catherine Laidlaw-Sly	National Council of Women of Canada
Bev LeFrancois	Community Centre for Peace, Ecology, and Human Rights
Heather Levecque	Ontario Federation of Indian Friendship Centres
Victoria Machaelo	National Council of Women of Canada
Martha Mackinnon	Justice for Children and Youth
Imam Ibrahim Malabari	Jamie Mosque, Toronto
Khorer Maled	
Karen Malek	Association of Muslim Arbitrators
Ali Mallah	Muslim Canadian Congress
Alfred A. Mamo	Mamo and Associates, Barristers and Solicitors
Sylvia Maracle	Ontario Federation of Indian Friendship Centres
Julie Matthews	Community Legal Education Ontario (CLEO)
Wasi Mazhar	Dar-ul-Qada
Marilou McPhedran	Consultant, Canadian Counsil of Muslim Women
Shakilah Mehrunnisa	
Randa Meshki	Service provider, Centre de santé communautaire

	de Hamilton (Hamilton Francophone community health centre)
Paul Mineiro	Fathers Are Capable Too (FACT)
Faduma Mohamed	Toronto Police Muslim Consultative Committee
Hamdi Mohamed	Pinecrest-Queensway Health and Community Services
Gitee Mosavi	Women's Liberation
Jeanne-Françoise Mouè	Mouvement ontarien des femmes immigrantes francophones (MOFIF)
Ayshia Mussleh	Ethno Racial People with Disabilities Coalition of Ontario (ERDCO)
Khadija Mustafa-Ali	Freelance media consultant
Amena Nabi	Canadian Council of Muslim Women (Ottawa)
Aley Naqui	Dar-ul-Qada
Maria Neil	Canadian Council of Muslim Women
Daljit S. Nirman	
S. Banor Noor	Dar-ul-Qada
Joanna Obrejanus	Dar-ul-Qada
Chelby Oniyemofe	Canadian Council of Muslim Women
Marianne Park	Board member DisAbled Women's Network (DAWN)
Helen Parker	Public Health Nurse
Imam Abdul Hai Patel	Coordinator – Islamic Council of Imams – Canada
Gaëtanne Pharand	Action ontarienne contre la violence faite aux femmes
Luba Podolsky	Provincial Council of Women of Ontario
Imam Faisal Razak	Assistant Coordinator – Islamic Council of Imams – Canada
Saeedeh Razani	Iranian Women's Organization
Joel Richler	Canadian Jewish Congress
Simon Rosenblum	Director Public Policy, Canadian Jewish Congress

Ruth Ross	Christian Legal Fellowship
Rabbi Joel Roth	Chair, Canadian Jewish Congress
Susan Russell	Canadian Federation of University Women
Josette Rutababiza	Mouvement ontarien des femmes immigrantes francophones (MOFIF)
Solmaz Sahin	Canadian Council of Muslim Women
Haroon Salamat	Toronto and Region Islamic Congregation
Rabab Salim	Service provider, Centre de santé communautaire de Hamilton (Hamilton Francophone community health centre)
Niaz Salimi	Muslim Canadian Congress
Imam Hamid Salimin	Secretary and Chair – Islamic Jurisprudence Committee of Islamic Council of Imams
Riad Saloojee	Canadian Council on American Islamic Relations – Canada (Cair-Can)
Helen Saravanamutloo	Canadian Council of Muslim Women
Anne Saris	Sectional Lecturer at McGill University in Family Law and Religious Norms
Diane Sasson	Executive Director, Auberge Shalom (Jewish women's shelter, Montreal)
Irfan Sayed	Muslim Lawyers Association
Nasreen Shah	Legal Assistant Goodmans LLP
Mazharulhaque Shaheen	Dar-ul-Qada
Farzana Hassan Shahid	Muslims Against Terrorism
Mohammed Shahid	
Hanif Shaikh	Toronto Police Muslim Consultative Committee
Mubinn Shaikh	Masjid El-Noor
Uzma Shakir	Executive Director, Council of Agencies Serving South Asians (CASSA)
Sheena Sharp	Humanist Association of Canada
Danielle Shaw	Government Relations Director, The Salvation Army

Adbul Sheikh	Masjid El-Noor
Haniya Sheikh	Muslim Lawyers Association
Nadira Sheralam	Co-Chair, South Asia Left
Amina Sherazee	Canadian Council of Muslim Women
A. Shiraz	Muslim Canadian Congress
Issam Shukri	Coordinator of Organization for the Defense of Secularism in Iraqi Society-ODSIS
Arif Siddiqui	Dar-ul-Qada
Robert Simpson	Communications Advisor, Campaign Against Sharia Court
Imam Hamid Slimi	Islamic Jurisprudence Committee of Islamic Canada
Khaddouj Souaid	Canadian Council of Muslim Women
Kate Stephenson	Co-chair LEAF National Legal Committee
Naseer (Irfan) Syed	Muslim Lawyers Association
John Tibor Syrtash	Beard Winters LLP
Zamzam Tan	Carlington Community and Health Services
Rabbi Roy Tanenbaum	Conservative Beit Din
Adama Touré	Crisis line worker, Oasis centre des femmes
Rabbi Reuven Tradburks	Orthodox Beis Din
Zubeda Vahed	
Wahida Valiante	Canadian Islamic Congress
Valery Vlad	Documentary Filmmaker
Asna Warsi	
Nosheen Warsi	
Lorraine Waugh	Women of Halton action Movement
Cindy Wilkey	Lawyer, Income Security Advocacy Centre
Mila Younes	Muslim, member of MOFIF and author of a book on the status of Muslim women

Nasreen Zahirieh	
Iman Zebian	Canadian Council of Muslim Women
Nezha Zizi	Immigrant Women Services & Canadian Council of Women

APPENDIX III

List of Submissions

I would like to thank all of those people who took the time to write letters to my Review. Unfortunately, your letters and e-mails were too numerous to name you all individually. Similarly, many citizens signed petitions that were received by the Review; I am equally unable to list the names of each individual petitioner.

However, your thoughts were important in articulating the scope of the question, and in identifying specific issues. The concern of the citizens of Ontario with respect to the question of arbitration of family law and inheritance matters and its possible impact on vulnerable people demonstrates that we are an engaged and mature society prepared to grapple with difficult issues in a constructive and positive manner.

Organization	Submission
Association Of Muslim Arbitrators	Review of Ontario's *Arbitration Act* & the Arbitration Process
B'nai Brith Canada	Review Of The Arbitration Process Religion and Culture in Canadian Family Law
Canadian Council Of Muslim Women	Review of the Ontario *Arbitration Act* and Arbitration Processes, Specifically In Matters of Family Law Applicability of Sharia/Muslim Law in Western Liberal States
Canadian Council On American-Islamic Relations (CAIR-CAN)	Review of Ontario's Arbitration Process and *Arbitration Act*
Canadian Foundation For Children Youth And The Law	Justice For Children and Youth
Canadian Islamic Congress	Materials provided
Canadian Jewish Congress	Materials provided
Canadian Muslim Lawyer Association	Canadian Muslim Lawyer Association – Summary of Submissions to Marion Boyd Re Review Of Private Arbitrations Process In Ontario
Christian Legal Fellowship	Ministry of the Attorney General Of Ontario – Religious Arbitration Review
Coalition Of Jewish Women For The Get	Materials Provided
Community Legal Aid Ontario (CLEO)	Materials Provided
Council Of Agencies Serving South-Asians	Oral submission only
Dar-ul-Qada	Materials provided

Disabled Women's Network Dawn	Oral submission only
Dr. Barbara Landau, Cooperative Solutions	Materials provided
Dr. Mamuda Khan	Materials provided
Fathercraft	Materials provided
Fathers Are Capable Too – FACT	The *Arbitration Act* and Family Law
Francophone Violence Against Women Advocates	Materials provided
His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board for Canada	Submission to Ontario Arbitration Review
Humanist Society	Materials provided
International Campaign Against Shari'a Court In Canada	Petition Against Sharia
Islamic Council Of Imams – Canada	Islamic Arbitration Tribunals & Ontario Justice System
Islamic Humanitarian Service	Response to Review of Ontario's Arbitration Process and *Arbitration Act*
Islamic Institute Of Civil Justice	Materials provided
The Islamic Society of North America	ISNA Canada Position Statement: Muslim Tribunals in Ontario
The Islamic Society of Toronto	Review of Ontario's Arbitration Process & the *Arbitration Act*
Masjid El Noor	Shariah Tribunals and Masjid El Noor: A Canadian Model
Movement ontarien des femmes immigrantes francophones	Materials provided
Muslim Canadian Congress	Submissions by Muslim Canadian Congress – Review of Arbitration Process by Marion Boyd
Muslim Women's Congress	Materials provided
Muslims Against Terrorism	Materials provided
Abu Muta'zila	Materials provided
National Association Of Women And The Law	Family Arbitration Using Sharia Law: Examining Ontario's *Arbitration Act* and Its Impact on Women
National Council Of Women Of Canada	Materials provided
Ontario Bar Association	Oral submission only

Ontario Council Of Agencies Serving Immigrants – OCASI	Oral submission only
Ontario Federation of Indian Friendship Centres	Materials provided
Provincial Council of Women of Ontario	Materials provided
Toronto Police Muslim Consultative Committee	Islamic Arbitration Tribunals In Ontario
United Muslims	Materials provided
Madeline Weld	Critique of the Islamic Sharia Proposal in Canada
Women's Legal Education And Action Fund – LEAF	Women's Legal Education and Action Fund ("Leaf"): Submission to Marion Boyd in Relation to Her Review of the *Arbitration Act* – September 17, 2004

APPENDIX IV

Rules for Conciliation Proceedings

His Highness Prince Aga Khan Imami Ismaili National Conciliation and Arbitration Board for Canada

1. DISTINCTION BETWEEN CONCILIATION AND ARBITRATION

1.1 "Conciliation" is a process of mediation in which a neutral person assists the parties to a dispute in reaching their own settlement. The neutral person does not have authority to make a binding decision on the parties. As the process is entirely voluntary, the parties may withdraw from the process at any time.

1.2 By contrast, "arbitration" is a process in which each party presents its case at a hearing before a panel of one or more persons who make a final and binding decision which is subject, under certain very limited circumstances to review by the courts of law.

2. MANDATE OF THE BOARD

2.1 The Board's role as conciliator is defined in article 13.1 (a) of the Ismaili constitution as follows:

> "to assist in the conciliation process between parties in differences or disputes arising from commercial, business and other civil liability matters, domestic and family matters, including those relating to matrimony, children of a marriage, matrimonial property , and testate and intestate succession".

2.2 It is the Board's duty to handle all disputes confidentially, expeditiously and with the minimum of expense.

3. PRE-INTERVIEW

3.1 All cases shall in the first instance, be referred to the Regional Board, together with the following basic particulars:

(a) Names, addresses and telephone numbers of the parties; and

(b) the general nature of the dispute

3.2 The Chairman of the Regional Board, after being satisfied that the dispute falls within article
13.1 (a) of the Ismaili constitution and that the case is not one for referral to some other body (see Rules 3.3 and 3.4 below), shall assign a member of the Regional Board to conduct a preliminary interview.

3.3 Where a party is resident outside the territorial jurisdiction of the Regional Board, the Regional Board shall inform the National Board and consult with the National Board as to the most appropriate manner of settling the case. Where a party is resident outside (country), The National Board shall for the purpose of conciliation co-ordinate with the National Board having responsibility for the country of residence of the other party, whilst keeping the International Board informed at all times and dealing generally with the matter in accordance with any advice which may be received from the International Board.

3.4 In order to reserve to the Board the task of assisting primarily in the resolution of the more serious disputes (so as not to burden the Board's limited resources by relatively minor disputes) and also to prevent the Board from turning into a "counselling clinic" or "crisis centre", cases shall, where they fall appropriately within the responsibility of other jamati institutions, such as the Council's Social and Welfare or marriage committees, be referred to those institutions.

4. PRELIMINARY INTERVIEW

4.1 The interviewer shall promptly contact the parties and obtain from them the relevant particulars on a form such as the one described in the Schedule hereto.

4.2 The interviewer shall request each party to sign a submission form containing the following particulars:

(a) a brief statement of the issues to be resolved, and the acknowledgment that the dispute is submitted to the Board for conciliation;

(b) where applicable and if possible, an undertaking that any legal proceedings will be stayed while the dispute is under conciliation, but without restricting the right of a party to take such steps as may be necessary to prevent an action being time barred under any law governing limitations;

(c) an acknowledgment that any statements made by the parties shall be on a "without prejudice" basis and for the purposes of settlement only,

(d) a waiver by the parties of any possible claim they may have against the conciliator concerning recommendations that may be made or opinions offered in the course of the conciliation; and

(e) an acknowledgment that the parties have voluntarily submitted to the jurisdiction of the Board.

4.3 Where a dispute is submitted to the jurisdiction of the Board by only one party to the dispute, the interviewer shall contact the other party by letter or in person, to invite that other party to use the services offered by the Board; but such contact shall not be in a manner likely to be perceived as partisan and shall emphasize only the advantages to both parties and participating in the conciliation process (i.e. an expeditious and inexpensive resolution of the dispute; handled confidentially).

4.4 Upon completion of the interview, the interviewer shall report to the Chairman who shall assign the case for conciliation, after being satisfied:

(a) that the dispute falls within Article 13.1 (a) of the Ismaili Constitution

(b) that the case is not appropriate for referral to some other body; and

(c) that the parties have executed the submission, form referred to in Rule 4.2 above.

5. CONCILIATION

5.1 The Chairman shall select conciliators in accordance with the following criteria:

(a) the conciliator shall enjoy the respect of the parties, be able to exert moral persuasion and, where technical expertise or other special skills are required in a case, should possess such expertise or skills;

(b) the conciliator should have no interest in the outcome of the case nor be aware of any circumstances which could raise a likelihood of perceived bias;

(c) layman should normally be preferred over lawyers (firstly, so as to leave the lawyers available to handle the dispute should it proceed to arbitration and secondly, in order to avoid the potential problem of a recommendation for settlement by a lawyer-conciliator being construed as a legal opinion);

(d) Members of the National and Regional Boards should be preferred over other members of the jamati

(e) in order to ensure the proper accountability of the conciliator to the Board, where a non-Board member is asked to act as conciliator, that individual shall be assigned to the case jointly with a Board member, whose duty it shall be to monitor the case and report on its progress to the Board periodically pursuant to Rule 10 below; and

(f) in complex disputes a team of two or more conciliators may be preferred so that each can consult with the other on ways in which to resolve the case.

5.2 Notwithstanding the relative informality of the conciliation process (as compared to the formal hearings involved in arbitration), all conciliation shall be conducted in a dignified setting, wherever such are available.

5.3 The conciliator shall conduct the conciliation in a fair, ethical, orderly and dignified manner, and in accordance with the following guidelines:

(a) the purpose of the conciliation should be to persuade the parties to a meeting of minds, to resolve their differences amicably, and accordingly the role of the conciliator shall be merely to persuade and under no circumstances to coerce.

(b) the conciliator shall not offer to the parties any legal or technical advice, nor any valuation or opinion, and as far as may be practicable shall invite the parties to rely on their own judgment in considering any offers to settle;

(c) none of the parties shall be represented by a legal practitioner. However, if the parties wish they may with the consent of the conciliator, seek the assistance of a close friend or family member at the conciliation;

(d) the conciliator shall not participate in or encourage any unethical or illegal settlement

(e) the conciliator shall reserve the right to withdraw from the case if the parties conduct themselves in a disorderly or improper manner, or if the parties breach any undertaking to the Board;

(f) essential facts of the case shall be recorded and retained, along with supporting documentation, in the conciliator's files, which shall be submitted to the Board's custody at the conclusion of the conciliation;

(g) at all times, the conciliator shall respect the confidence of the parties and shall not, without the leave of all concerned parties, discuss or report (save as contemplated in Rule 10 below) any aspect of the dispute in a manner that might prejudice the parties; and

(h) the conciliation shall be commenced without undue delay and shall be conducted and concluded expeditiously.

5.4 If the parties have not, within such time as is reasonable having regard to the complexities and exigencies of the case, been able to reach a settlement, the conciliator shall report to the Board and recommend either termination of the conciliation or referral of the case pursuant to Rule 7 below.

6. SETTLEMENT

6.1 Where the parties have agreed to settle their differences, the conciliator shall prepare Minutes of Settlement recording all the essential terms of the settlement and shall have the parties sign the Minutes after obtaining Independent Legal Advice to signify their acceptance of the settlement.

6.2 The conciliator, where the complexities of the case warrant it, may request the assistance of lawyers to prepare the Minutes of Settlement -but the drafters of such document shall be mindful not to introduce into it materially new terms that might frustrate the discussed agreement.

7. FURTHER CONCILIATION

If at the conclusion of the conciliation the conciliator recommends further attempts at mediation, or if the parties request it, the Regional Board may refer the case to the National Board for further mediation.

8. CONFIDENTIALITY

All cases shall be treated confidentially.

9. CONFLICTS OF INTEREST

9.1 Given that all Board Members are entrusted to act responsibly, the Board shall not entertain any dispute in which a party insists that the party's submission of its dispute to the Board is conditional on the Board keeping the facts of the dispute confidential from one of its members.

9.2 When a case is referred to the Board, upon learning of the names of the parties and, where necessary, the general nature of the dispute, members of the Board are expected to declare forthwith if they have or may probably have:

(a) any conflict of interest; or

(b) any perceptible bias that could compromise the Board in its handling of the case.

9.3 Where a Board member has a conflict of interest or where, in the opinion of the Board as a whole, there is a serious likelihood of perceived bias that could compromise the Board in its handling of the case, the Board member involved will be expected to abstain from any dealings in the case and from accessing the case file.

10. REPORTING

10.1 The Board member assigned to conduct an interview shall, promptly after conducting the interview, report on its outcome to the Board.

10.2 Upon being assigned to mediate a dispute, the conciliator shall promptly make an assessment of the complexities of the case and flexibility of the parties, and shall thereupon give to the Board, or the Chairman, an estimate of the anticipated time required to mediate the dispute. In addition, the conciliator shall, at least at each meeting, or more frequently as the circumstances may reasonably require, provide to the Board or Chairman a progress report of the case. The purpose of the progress report to the Board, or the Chairman, shall be to enable the Board, or the Chairman, to ensure that the case is being handled expeditiously and to apprise the Board of, and consult with its members on, any complications in the conciliation process.

11. DO'S AND DON'TS OF CONCILIATION

11.1 The conciliator shall not undertake mediation with any persons whom he has previously represented or to whom he has given any prior advice relating to the dispute. If there has been any previous contact with either one or both of the parties on an unrelated matter this should be disclosed to both the parties and the conciliator should proceed only on the written consent of both the parties.

11.2 The conciliator should inform the parties before the mediation commences that he will be functioning as a conciliator and not as an adviser for either or both the parties.

11.3 In order to maintain neutrality, the conciliator should avoid giving specific legal advice and should dispense only general legal information in the presence of both parties during the proceedings.

11.4 The conciliator should stay within his or her own area of competence and should not attempt to mediate highly contentious disputes without proper knowledge.

11.5 The conciliator should terminate mediation if at any time he believes that the condition for mediation have been breached or if in his opinion anyone of the participants is being harmed or seriously prejudiced by the process.

11.6 The Minutes of Settlement should be executed in the presence of the Chairman of the Board, if possible, after obtaining, independent legal advice to avoid any appearance of coercion on the part of conciliator.

11.7 The conciliator should decline to advise either of the parties in subsequent legal proceedings related to the dispute.

APPENDIX V

Rules for Arbitration

His Highness Prince Aga Khan Imami Ismaili National Conciliation and Arbitration Board for Canada

1. TITLE, DEFINITIONS AND INTERPRETATION

1.1 These Rules shall be known as The Rules for Arbitration in Canada".

1.2 In these Rules, the words and expressions set out below shall have the meanings set out opposite them unless the contrary intention appears or the context otherwise requires:

"Appeal Board" the National Board or the International Board as the context may require

"Regional Board" the Regional Conciliation and Arbitration "National Board" Boards or the National Conciliation and "International Board" or "Board" Arbitration Board or the International Arbitration Board (as the context may require)

"Arbitration Panel" one or more persons appointed in accordance with Rule 4 to act as arbitrators

"Award" or "Partial Award" or a decision of the Arbitration Panel on any "Interim Award" substantive issue placed before it

"Claimant" the person making the claim which is the subject of arbitration

"Constitution" the Ismaili Constitution

"Respondent" the person defending the claim which is the subject of arbitration

1.3 In these Rules unless the contrary intention appears:

(c) words importing the masculine gender include the feminine;

(d) words importing the feminine gender include the masculine;

(e) words in the singular include the plural;

(f) words in the plural include the singular;

(g) references to a person include a body of persons corporate or unincorporate; and

(h) references to the Arbitration Board shall include the Arbitration Panel in respect of an arbitration which has commenced.

1.4 Headings are inserted in these Rules for ease of reference only and do not form part of the Rules for the purpose of construction.

1.5 The failure at any time by the Arbitration Board to require performance by any person of any provision of these Rules shall in no way affect the right of the Arbitration Board to require such performance, and any waiver in respect of any person of any breach of any of these provisions shall not be construed as a waiver of any continuing or succeeding breach of that provision.

2. APPLICABILITY AND LAW OF ARBITRATION

2.1 These Rules shall apply to every arbitration of which the Arbitration Board is seized subject only to the overriding effect of any applicable laws of the jurisdiction where the arbitration takes place to the extent of any inconsistency.

2.2 The Arbitration Board shall apply such laws to the dispute as shall be applicable having regard to the rules on the conflict of laws.

2.3 Subject to the Rule 2.2, the Arbitration Board shall make its awards in accordance with the terms of any contract between the parties and shall have due regard to the relevant usages of trade or custom.

2.4 The Chairman of the Arbitration Board or the Arbitration Panel (if already constituted} shall determine whether the Arbitration Board has jurisdiction to hear and decide any application which may be made to it. Any such question shall (unless the Arbitration Panel otherwise directs} be raised no later than the closure of pleadings as described below.

2.5 The jurisdiction of the Arbitration Board or the Arbitration Panel (if already constituted} shall not be invalidated by reason only that the contract containing the agreement to submit to arbitration is declared by the Arbitration Award to null and void.

3. COMMENCEMENT OF ARBITRATION

3.1 Any person may apply to the Arbitration Board to submit for arbitration any dispute to which he is a party .Any such application shall be in writing and shall state:

(a} the name and address of every other party to the dispute;

(b} brief details of the dispute;

(c) whether all parties have agreed to submit the dispute to the Arbitration Board, and if so, supply a copy of such agreement.

3.2 The Arbitration Board shall proceed with the application only if satisfied that it discloses a cause of action over which the Arbitration Board would have jurisdiction if all the parties agreed to submit the matter for arbitration to the Arbitration Board. If it is not so satisfied, it shall reject the application and notify the applicant accordingly.

3.3 If it has previously been agreed in writing between the parties to the dispute to submit the matter to the Arbitration Board for arbitration and the Arbitration Board is satisfied as to the validity of that agreement, the Arbitration Board shall send a copy of the application to the other parties to the dispute.

3.4 If it has not previously been agreed in writing between the parties to the dispute to submit the matter to the Arbitration Board for arbitration:

(a} the Arbitration Board shall send a copy of the application for arbitration to the 5 other parties to the dispute;

(b) a copy of the application shall be accompanied by a submission agreement completed in all material respects in connection with the proposed arbitration in the form set out in the First Schedule whereby all the parties to the dispute would agree to submit the dispute for arbitration to the Arbitration Board in accordance with these Rules;

(c) a copy of the submission agreement shall simultaneously be sent to the person who submitted the dispute for arbitration for execution by him; and

(d) failing return of the duly executed submission agreement by every party to the dispute within 21 days of its dispatch by the Arbitration Board or such later time as the Chairman of the Arbitration Board may determine, the proposed arbitration will be deemed to have failed and all the parties to the dispute shall be informed accordingly.

3.5 The arbitration shall be deemed to have commenced:

(a) in the case of Rule 3.3, from the date of notification to the other parties to the dispute of the contents of the application for arbitration; or

(b) in the case of Rule 3.4, from the date of receipt by the Arbitration Board of the submission agreement signed by all the parties to the dispute, which agreement may take the form of several documents of the like form each signed by one or more of the parties to the dispute.

3.6 The Arbitration Board shall notify all the parties to the dispute of the date of commencement of the arbitration, and the designation of the parties for the purpose of arbitration, in particular:

(a) which party is the Claimant;

(b) which party is the Respondent;

(c) the designation of other parties, for example any Third Parties and any Second, Third or subsequent Respondents.

4. COMPOSITION OF THE ARBITRATION PANEL

4.1 The Chairman of the Arbitration Board shall (unless otherwise agreed by the parties) meet with the parties to the arbitration to select the Arbitration Panel, which shall be composed of:

(a) anyone individual, whether or not a member of the Arbitration Board, upon whom the parties and the Chairman of the Arbitration Board unanimously agree and who himself agrees, should be the sole member of the Arbitration Panel; or

(b) any three individuals, of whom one at least shall be a member of the Arbitration Board, on all of whom the parties unanimously agree, and who themselves agree to act as the Arbitration Panel; or

(c) failing agreement under Rule 4.1 (a) or 4.1 (b) either one or three members of the Arbitration Board as the Chairman of the Arbitration Board shall designate.

4.2 Every Arbitration Panel shall have a chairman who shall be:-

(a) the sole arbitrator in the case of an Arbitration Panel of only one individual;
(b) the member of the Arbitration Board in the case of an Arbitration Panel which includes only one member of the Arbitration Board; or

(c) such member of the Arbitration Board as the Chairman of the Arbitration Board shall designate in the case of an Arbitration Panel which includes more than one member of the Arbitration Board.

4.3 Any person approached to act as a member of the Arbitration Panel should forthwith disclose to the Chairman of the Arbitration Board any conflict of interest which he may have or any factors which are likely to be seen as impeaching his impartiality or independence whether or not they actually do so, and the Chairman of the Arbitration Board may accordingly exclude him from acting as an arbitrator.

4.4 Any person appointed as a member of the Arbitration Panel shall be under an obligation forthwith to disclose to the Chairman of the Arbitration Board any conflict of interest of which he becomes aware during the course of an arbitration or of any factors which are likely to be seen as impeaching his impartiality or independence whether or not they actually do so, and the Chairman of the Arbitration Board may accordingly disqualify him from continuing to act as an arbitrator.

4.5 In the event of the death, resignation, disqualification or other incapacity, of a member of the Arbitration Panel occurring or becoming apparent before the termination of the arbitration, the Chairman of the Arbitration Board shall review the status of the arbitration and, after consulting with the remaining members (if any) of the Arbitration Panel and the parties to the arbitration, may take one or more of the following courses of action:-

(a) appoint a substitute arbitrator to take up the vacancy in the Arbitration Panel;

(b) direct that the arbitration should commence anew;

(c) direct that the newly appointed member of the Arbitration Panel be fully briefed by the other members of the Arbitration Panel on the status of the arbitration and that thereafter the arbitration continue without the need for any re-submission of pleadings or evidence.

5. ASSISTANCE AND REPRESENTATION

5.1 Any party to an arbitration shall be free to seek assistance in the preparation of his submissions to the Arbitration Panel.

5.2 Subject to the legal right of any party to be represented by a lawyer any party deciding to be represented before the Arbitration Panel shall first seek the written consent of the Arbitration Panel. Any such written consent may:

(a) be specific for the named representative who should preferably be an Ismaili;

(b) provide directions as to the fees which may be charged by the representative;

(c) oblige the representative to agree to abide by these Rules and to respect the authority of the Arbitration Board and the Arbitration Panel in all matters connected with the arbitration.

6. PLEADINGS

6.1 The claimant shall submit a Statement of Claim to the Arbitration Panel within 14 days of the Commencement of arbitration. The Statement of Claim shall:

(a) briefly state the alleged facts;

(b) disclose the cause of action;

(c) identify the remedy sought;

(d) have attached to it copies of any documents on which the claimant relies to prove his case;

(e) refer to any further documents the Claimant intends to submit in support of his case and shall state when these will be submitted to the Arbitration Panel;

6.2 The Respondent shall submit a Defence to the Arbitration Panel within 21 days after service on him of the Statement of Claim. The Defence shall:

(a) state whether or not the alleged facts contained in the Statement of Claim are admitted and, if not, the extent to which they are denied;

(b) state the nature of the defence;

(c) have attached to it copies of any documents on which the Respondent relies in his defence

(d) refer to any further documents the Respondent intends to submit in support of his defence and state when these will be submitted to the Arbitration Panel;

(e) state any Counterclaims in the same format as a Statement of Claim as described in Rule 6.1.

6.3 Save with the Consent of the Arbitration Panel, no counterclaim will be permitted to be made after submission of the Defence.

6.4 The Claimant shall be entitled to reply to any counterclaim within 21 days of the service on him of the Defence and any such Response shall be in the same format as a Defence as described in Rule 6.2 save and except for the right to make a Counterclaim.

6.5 Any other Respondents shall submit their pleadings at such time and in such manner as the Arbitration Panel may direct.

6.6 The Arbitration Panel shall, on the application of any party to the arbitration, decide whether to allow it to submit further pleadings and if So, shall fix the time within which such pleadings shall be submitted.

6.7 Pleadings already submitted shall not be amended save with the written consent of the Arbitration Panel.

6.8 The Arbitration Panel shall notify the parties when the pleadings have closed.

7. PROCEEDINGS BEFORE THE ARBITRATION PANEL

7.1 Subject to the provisions of this Rule 7, the Arbitration Panel may hear and decide the arbitration in such manner as it sees fit and shall have such authority and discretion as are necessary in all procedural matters to ensure a just and equitable conclusion to the arbitration.

7.2 The Arbitration Panel shall strictly adhere to and apply the rules of natural justice equity and good conscience.

7.3 Any document supplied to the Arbitration Panel by one party shall (unless otherwise directed by the Arbitration Panel) simultaneously be supplied to the other parties;

7.4 Any document supplied in any language other than the language of the arbitration itself shall be translated into the language of the arbitration and be certified to the satisfaction of the Arbitration Panel as a true and accurate translation.

7.5 The written testimony of witnesses shall be submitted as affidavits subject to the right of any party to require the cross examination of any such witness. The Arbitration Panel may draw such conclusions as it sees fit from any default on the part of a deponent to submit to cross-examination.

7.6 At the request of any party to the arbitration, the Arbitration Panel shall hear oral evidence and oral argument on such issues and from such witnesses as may have been previously notified in writing to the Arbitration Panel. In the absence of any such request, the Arbitration Panel shall decide whether to dispose of the matter on the basis of the documents alone or whether to hear oral evidence and oral argument.

7.7 Any oral proceedings before the Arbitration Panel shall be in camera and shall take place at such place and time as the Chairman of the Arbitration Panel may determine having regard to the needs of the parties and any special circumstances regarding the type of evidence to be submitted but having paramount regard to the dignity and impartiality of the proceedings.

7.8 In the event of oral proceedings, the parties shall be required to submit in writing to the Arbitration Panel details of the names and addresses of witnesses they intend to call. Muslim witnesses shall give evidence under the form of oath set out in Part I of the Second Schedule and non-Muslim witnesses shall give evidence under the form of oath or affirmation set out in Part II of the Second Schedule.

7.9 Subject to Rule 7.8, the Chairman of the Arbitration Panel shall determine the manner of examination of the witnesses and in particular, but without limitation, whether:

(a) the testimony of witnesses should be transcribed or recorded by any manual or electronic means; and

(b) whether any witnesses should be allowed to remain present whilst the testimony of 9 any other witness is being given.

7.10 All correspondence with the Arbitration Panel shall be conducted through the headquarters of the Arbitration Board and shall be addressed to the Chairman of the Arbitration Panel.

7.11 The parties shall produce to the Arbitration Panel such documents as it may require to be produced to it and the Arbitration Panel may draw such conclusions as it sees fit from any default.

7.12 Any procedural matters concerning the conduct of the arbitration shall be decided by the Chairman of the Arbitration Panel.

7.13 If at any stage of the arbitration proceedings, any party fails to appear or to present its case within the time limits prescribed by these Rules or by the Arbitration Panel, the Arbitration Panel may of its own motion or at the request of any other party, and upon giving reasonable notice to every other party, proceed with the arbitration and make an award.

7.14 Proceedings before the Arbitration Panel being for the bona fide purpose of resolving the dispute between the parties shall deem to be absolutely privileged and accordingly the parties agree that to the extent permitted by law:-

(a) except for the Arbitration Award or any Interim or Partial Award, none of the documents, papers or record of oral evidence in the possession of the Arbitration Panel or in the possession of the parties to the arbitration by virtue of having been submitted specifically for the purpose of the arbitration shall be available for production in subsequent judicial proceedings; and

(b) no member of the Arbitration Board or Arbitration Panel shall be called upon to give evidence of any kind in any such subsequent judicial proceedings.

8. CONFIDENTIALITY

The parties to the arbitration shall not at any time divulge or communicate to any person other than a person directly concerned with the arbitration any information concerning the arbitration.

9. AWARDS, INTERIM AWARDS AND PARTIAL AWARDS

9.1 The Arbitration Panel may make such Award in respect of the arbitration as it may determine and in the case of an Arbitration Panel comprising three or more members, its decision shall be reached by simple majority of its members.

9.2 The Award shall:-

(a) be in writing signed by every member of the Arbitration Panel in the presence of each other and any dissenting member of the Arbitration Panel may append a note of his dissension;

(b) state the date and place of the Award;

(c) not be accompanied by reasons unless the Arbitration Panel shall itself choose to provide a reasoned Award;

(d) be simultaneously sent to all parties to the arbitration;

(e) be filed or registered by the Arbitration Panel with the Arbitration Board which shall in turn file or register the award with such other authority as may be required by the laws of the jurisdiction where the arbitration took place or may need to be enforced;

(f) be subject to appeal as described in the Constitution; and

(g) subject to appeal, be final and binding and be carried out by the parties forthwith.

9.3 The Arbitration Panel may at any time dispose of part only of the matters placed before it for arbitration by making such Partial Award as it deems fit.

9.4 The Arbitration Panel may on the application of any party to an arbitration before it, make such Interim Award as it considers necessary to protect the position of the parties pending the conclusion of the arbitration and the making of the Award. Any such Interim Award may be made subject to such conditions as the Arbitration Panel may determine, including, without limitation, requiring the party requesting such Interim Award to give security for any loss which may be suffered by the other parties to the arbitration by reason of the Interim Award.

9.5 Within 21 days of the date of any Award, Partial Award or Interim Award the Arbitration Panel may, or any parties to the arbitration may, with notice to the other parties, require the Arbitration Panel to:-

(a) resolve any ambiguity in the award;

(b) correct any errors of computation or of a clerical or typographical nature in the award;

(c) except in the case of a Partial Award or an Interim Award make an additional Award where the original Award does not deal with all the issues put before the Arbitration Panel for resolution.

10. SETTLEMENT OF ARBITRATION

10.1 The Arbitration Panel may at any time adjourn the proceedings or allow such facility as any of the parties may at any time request in the conduct of the arbitration to enable the parties to settle the dispute amicably between them and to bring the arbitration to an end.

10.2 If in the course of an arbitration the parties come to an agreed settlement of the issues placed before the Arbitration Panel for resolution, they may unanimously request the Arbitration Panel to issue a Settlement Award in such terms as may have been agreed between the parties.

10.3 If the Arbitration Panel sees fit, it may issue such Settlement Award, but shall not.be obliged to state any reasons for the Award.

10.4 The Settlement Award shall be treated for all purposes as an Award of the Arbitration Panel.

11. TERMINATION OF ARBITRATION

11.1 Subject to any right of appeal, the arbitration shall be deemed to be terminated with effect from the date of the Award.

11.2 The Arbitration Panel shall issue an order of termination of the arbitration if at any time:

(a) all the parties to the arbitration so request; or

(b) it appears to the Arbitration Panel that the arbitration has become infructuous or
unnecessary; or

(c) it appears to the Arbitration Panel that it has become impractical to continue the arbitration.

12. COSTS OF ARBITRATION

12.1 For the purpose of this Rule, the costs of the arbitration shall be the aggregate of the following costs incurred by the Arbitration Panel:-

(a) photocopying and secretarial services;

(b) postage, telephone, telex and facsimile transmissions;

(c) courier services;

(d) transportation, accommodation and incidental expenses of members of the Arbitration Panel;

(e) conference or meeting room hiring and location expenses;

(f) such other costs which may have been incurred by the Arbitration Panel for the purpose of arbitration.

12.2 The costs of the arbitration shall be estimated by the Arbitration Panel and notified to all the parties to the arbitration together with a direction to each party to the arbitration to pay in to the Arbitration Board his pro rata share of the estimated costs.

12.3 During the course of an arbitration the Arbitration Panel may make revisions to its estimate of costs and accordingly may require the parties to the arbitration to pay their pro rata share to the Arbitration Board.

12.4 A final account of the costs of the arbitration shall be prepared by the Arbitration Board within 30 days of the termination of arbitration and any reimbursement due to the parties to the arbitration or any further calls (as the case may be) shall be made by the Arbitration Board within the said 30 days and any such final account shall be final and binding between the parties to the arbitration.

13. EXCLUSION OF LIABILITY

The Arbitration Panel, the Arbitration Board and the individuals comprising the Arbitration Panel and the Arbitration Board shall not be liable to any of the parties to the arbitration for negligence, breach of contract, misrepresentation or otherwise connected in any way with the arbitration proceedings or the Arbitration Award.

14. NOTICES AND TIME PERIODS

14.1 Any notice or other communication to be served under these Rules shall be in writing and shall be deemed to have been properly served if sent by courier, facsimile transmission, telex transmission or prepaid first-class letter post to the last known address, facsimile number or telex number of the addressee of which details have been notified in writing by the addressee to the addressor prior to the service of such notice or other communication.

14.2 Any such notice or other communication shall be deemed to have been served:-

(a) at the time of delivery to the address in the case of courier delivery;

(b) immediately in the case of facsimile or telex transmission; and

(c) 48 hours after posting in the case of pre-paid first-class letter post.

14.3 For the purpose of calculating time periods under these Rules, the day of receipt of any notice or other communication shall not be counted.

14.4 The Chairman of the Arbitration Panel shall have discretion to:

(a) extend any period mentioned in these Rules or otherwise required for the arbitration as the period within which any pleadings or other documents are required to be served; and

(b) condone any delay in respect of the service of any documents in any arbitration before the Arbitration Panel.

15. APPEALS

15.1 An appeal will lie from an award of the Regional Board to the National Board

(a) upon application by the appellant and referral by the Regional Board to the National Board; or

(b) upon application by the appellant to and by special leave of the National

Board.

15.2 An appeal will lie from an award from the National Board to the International Board

(a) upon application by the appellant and referral by the National Board to the International Board; or

(b) upon application by the appellant to and by special leave of the International Board.

15.3 An application for referral may be made orally at or in writing within 14 days of the date on which the Regional or the National Board makes the award from which appeal lies.

15.4 An application for special leave shall be made in writing to the Appeal Board within 14 days of the date on which the Regional or the National Board refuses the application for appeal.

15.5 The application in writing referred to in Rules 15.3 and 15.4 above shall be served by the applicant on all the parties as well as the Board which heard the original proceedings.

15.6 The Chairman of the Appeal Board shall designate three members of the Appeal Board to hear and decide the Appeal on behalf of and in the name of the Appeal Board and shall designate one of the three to be the chairman for the purposes of the appeal.

15.7 The Appeal Board before making an award may in its discretion call for further information or require the parties to appear before it for oral submissions. It may also direct the Regional Board or the National Board to furnish it with further explanation on the subject matter or any question arising therein. The decision of the Appeal Board on application for special leave shall be final.

15.8 If leave is granted, the appellant shall file a Memorandum of Appeal within 30 days after the date on which such leave is granted.

15.9 The Memorandum of Appeal shall state the grounds of the appeal and supporting reasons and whether the appeal is against the whole or part of the award and if against a part only, must specify the part.

15.10 The Memorandum of Appeal shall be filed with the Appeal Board.

15.11 The Memorandum of Appeal shall be served upon all the other parties to the proceedings in which the award was given and upon the Board which gave the award. The service will be effected through the Appeal Board.

15.12 The Appeal Board shall hear or otherwise dispose of the appeal upon giving notice of not less than 14 days to the parties.

15.13 The Appeal Board shall in its absolute discretion have the power to:

(a) allow the appellant to amend the grounds stated in the Memorandum of Appeal or make any other award, on such terms as it thinks just, to ensure the determination on the merits of the real question in controversy in the proceedings before it;

(b) receive further evidence on any question of fact, and the evidence may be given in such manner as the Appeal Board may direct;

(c) draw any inference of fact which might have been drawn in the proceedings out of which the appeal arose;

(d) require for its use, to be furnished with a copy of the proceedings in which the award appealed against was given;

(e) enlarge time or excuse any delay in respect of anything to be done in the proceedings before it.

15.14 The Appeal Board:

(a) may give any decision or make any award which ought to have been given or made by the Board, and make such further or other award as the case may require;

(b) may remit the matter with the opinion of the Appeal Board for rehearing and determination by the Board;

(c) shall not be bound to allow the Appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Appeal Board substantial wrong or miscarriage or justice has been thereby occasioned.

(d) shall follow these Rules of Arbitration in all procedural aspects of the appeal unless it specifically decides otherwise and in particular:

(i) The Appeal Board shall have the same power to allow representation on behalf of the parties appearing before it as are vested in the Board under Rule 5 hereof; or

(ii) The members of the Appeal Board and a person, appearing before it on behalf of the parties shall have the same immunities as are vested in the members of the Board and persons appearing before it under Rule 13 hereof.

APPENDIX VI

Sample Arbitration Agreement
(Epstein Cole LLP)

IN THE MATTER OF THE *ARBITRATION ACT*
S.O. 1991, C.17

BETWEEN:

-and-

MEDIATION/ARBITRATION AGREEMENT

The husband, ______________ and the wife, ______________ were married on ___________ in the ________ of ________, in the _____________________.

The husband and the wife have been living separate and apart and wish to negotiate a final agreement with respect to the issues set out in this Agreement and have agreed to submit those issues designated in this Agreement to Philip M. Esptein, Q. as Arbitrator.

SUBMISSION

1. This document constitutes a submission to arbitrate pursuant to the provisions of the *Arbitration Act,* S.O. 1991, c 17 and amendments thereto.

SUBSTANTIVE ISSUES

2. The following issues are submitted for determination (check where appropriate)

   ( ) Custody or any incident of custody

   ( ) Access or any incident of access

( ) Child Support

( ) Entitlement to Spousal Support
( ) Duration of Spousal Support

( ) Quantum of Spousal Support

( ) Lump Sum Support

( ) All Property issues

( ) Other (specify)

( ) Costs

2.1 The above issues are being submitted (check where appropriate)

( ) for determination of interim relief if necessary

( ) for final determination

CONFIDENTIALITY

4. The proceedings and the record thereof shall be private and confidential, subject only to their being produced in proceedings for a judicial review.

SUPPORT

5. Issues related to child support and spousal support (on an interim and permanent basis) shall be determined in accordance with the provisions of the *Family Law Act,* R.S.O. 1990, c.F.3, as amended, or the *Divorce Act,* R.S.C. 1991 c. D-3.4 (2nd Supp.), as amended as may be applicable.

CUSTODY AND ACCESS

6. Issues related to custody and access of children (on an interim and permanent basis) shall be determined in accordance with the provisions of the *Children's Law Reform Act,* R.S.O, 1990, c. C12 or, if a divorce has been granted or the parties are involved in

divorce proceedings, then under the *Divorce Act,* R.S.C. 1991 c. D-3.4 (2nd Supp.), as amended.

PROPERTY

7. All property issues (and interim property issues) shall be determined in accordance with the provisions of the *Family Law Act,* R.S.O. 1990, C.F.3, as amended.

WAIVER OF RIGHTS TO LITIGATE IN COURTS

8. By submitting to arbitration those issues designated in paragraph 3 above, the parties herby waive any right to further litigate those issues in Court, whether pursuant to the *Family Law Act,* R.S.O. 1990, c.F.3, as amended; the *Divorce Act,* R.S.O. 1991, c.D-3.4 (2nd Supp.), as amended; or any other statute or law.

MEDIATION

9. On a date to be determined at the offices of Epstein Cole LLP, Mr. Epstein shall conduct a mediation with the parties and their counsel in respect of the issues in dispute.

10. If the mediation does not result in a settlement, then an arbitration will take place at a date to be fixed by the Arbitrator at the offices of Epstein Cole, LLP.

PROCEDURAL ISSUES IN RESPECT OF THE ARBITRATION HEARING

10. Time and Place: The hearing shall take place at the offices of the law firm of Epstein Cole LLP in the City of Toronto and Province of Ontario, at a time and date to be determined.

11. Arbitrator: The Arbitrator shall be Philip M. Epstein, Q.C.

12. Procedure on Hearing: The procedure shall be similar to court procedure wherever possible, and in particular:

    a. All witnesses shall be sworn (or affirmed) and shall be subject to examination in chief and cross-examination and re-examination;

b. Each party shall, in accordance with the direction of the Arbitrator deliver to opposing counsel and the Arbitrator, updated and current Financial Statement(s) (Form 69K), the reports of any experts being relied upon by him or her; and copies of a Hearing Record containing copies of court pleadings, if any, and/or a memorandum on outstanding issues.

c. All usual rules for the admissibility of evidence in court proceedings will apply as will the *Rules of Civil Procedure*.

13. Each party shall provide the other party with:

(i) A Position Statement of no more than five (5) typewritten (double-spaced) pages setting out his/her position in respect of the above issues, including all relevant documents;

REPORT OF ARBITRATOR FOLLOWING THE ARBITRATION HEARING

14. After the evidence has been received and submissions on the law have been made the Arbitrator shall deliver an Award on all issues submitted for determination.

AWARD

15. The Arbitrator's Award shall be final and binding upon the parties and shall be incorporated in a consent Order or Judgment, as the case may be, of the Ontario Superior Court of Justice (General Division).

NO RIGHT TO APPEAL

16. The parties hereby waive all rights to appeal the Award of the Arbitrator and the parties' rights will be restricted to applications for judicial review.

ARBITRATOR'S FEES AND DISBURSEMENTS

18. The Arbitrator's fees shall be $500.00 per hour for the hearing, any pre-arbitration conference, interim arbitration, preliminary meetings, mediation, arrangements, preparation for the hearing, preparation of a report and any follow-up. The parties and their solicitors shall be jointly and serially liable for the fees and disbursements of the Arbitrator.

19. Each party shall forthwith provide the Arbitrator with a retainer of $2,[illegible]00.00, with this retainer to be refreshed from time to time as the Arbitrator shall direct.

COSTS

20. As the issue of costs is submitted to the Arbitrator pursuant to paragraph 2 above, the Arbitrator's discretion regarding costs shall include the power to require one party to pay more than one-half, or all of the Arbitrator's fees and disbursements.

MEDIATION AND ARBITRATION

21. The parties agree that the Arbitrator can mediate all issues under dispute and the participation of the parties and/or their counsel and the Arbitrator in the mediation process shall not disqualify the Arbitrator from arbitrating the disputes.

WAIVER OF ARBITRATOR'S LIABILITY

22. The parties herby waive any claim or tight of action against the Arbitrator arising out of these proceedings.

DATED:

________________________ ____________________________
Solicitor for the Husband

________________________ ____________________________
Solicitor for the Wife

APPENDIX VII

Sample of Certificate of Independent Legal Advice
(B'nai Brith Canada)

CERTIFICATE OF INDEPENDENT LEGAL ADVICE

I, (name of solicitor), of the City of , in the Municipality of , MAKE OATH/AFFIRM AND SAY:

1. I am the solicitor for and am a subscribing witness to this Arbitration-Agreement, and I was present and saw it executed at by the said .

2. I verily believe that the person whose signature I witnessed is the party of the same name referred to in instrument.

3. I have advised the said with respect to the within Arbitration Agreement and I believer that he(she) is fully aware of the nature and effect of the Arbitration Agreement and is signing this document voluntarily.

4. Prior to signing the said Agreement, I thoroughly reviewed the provisions of Ontario's *Family Law Act, Children's Law Reform Act, Succession Law Reform Act* and Canada's *Divorce Act* and any other family law stature or principle under statutory or common law that may affect this party in her (his) particular case and in so doing I explained what rights or benefits he or she may be foregoing by signing the Arbitration Agreement and submitting to the law and procedures provided for under that Agreement.

5. Notwithstanding the generality of the foregoing, I further explained to the person whose signature I witnessed, if necessary for the purposes of this Arbitration, that he or she had a statutory legal duty to provide to his or her spouse or person with whom he or she had cohabited full and frank written financial disclosure of his or her significant assets and significant liabilities as of the date of marriage, the date of separation and as of the date when the Arbitration Agreement was being signed, pursuant to section 56(4) of

Ontario's *Family Law Act*, or any successor legislation, as well as complete written disclosure of his or her gross yearly income for the current and past three annual taxation years, pursuant to the provisions of the *Divorce Act*, and *Family Law Act*, failing which any ruling by the arbitrator or arbitrators could be set aside or not enforced by the Superior Court and, further, to provide any proof in the form of tax returns, pay stubs, corporate tax returns and valuations of business interests or any other such documentation for such purposes, if so requested by the other spouse or by the arbitrators.

6. I have further thoroughly considered with the person whose signature I have witnessed, the educational standards or lack of them, by which the arbitrators assigned to this arbitration conformed and by which they became qualified, or not, in order to arbitrate the dispute or disputes in question under the said Agreement, including the laws and procedures to be employed under it and the extent to which the said arbitrator or arbitrators have an acquaintance with Ontario's *Arbitration Act, Family Law Act, Divorce Act, Succession Law Reform Act* or any of its related statutes or any of its other laws under the province of Ontario and Canada as they may be related to this dispute.

7. Since the Arbitration Agreement pertained to resolving a dispute involving an inheritance, I specifically advised the party to provide to the arbitrators the following documentation and information which I explained was obligatory under Ontario law:

(a) any Last Will and Testament of the Deceased and probate thereof, together with any known copies of any Powers of Attorney granted to Third Parties, (if known);

(b) any holograph Will or other document purporting to represent a testamentary instrument;

(c) the full names, full addresses and phone numbers (if available) of any spouse or children of the deceased, (if any);

(d) the full names, full addresses and phone numbers (if available) of any third parties that may be under a mental and/or physical disability that may have been financially dependent on the deceased;

(e) the full names, full addresses and phone numbers of any known secured or unsecured creditors of the deceased, after having obtained an execution search and Bankruptcy search, (if any); and

(f) the list of all next of kin.

SWORN/AFFIRMED BEFORE ME at the)
City of in the Province of Ontario)
this day of 200__)

____

______________________________)
A Commissioner, etc.

Sample Affidavit of Solicitor
(B'nai Brith Canada)

AFFIDAVIT OF SOLICITOR AS SUBSCRIBING WITNESS

I, ____________________ , of the City of _______________ in the Municipality of _____________ , MAKE OATH/AFFIRM AND SAY:

8. I am the solicitor for and a subscribing witness to this Arbitration Agreement, and I was present and saw it executed at by the said .

9. I have been consulted in my professional capacity by a party named in the annexed agreement as to her obligations and rights under the said agreement and I acted solely for her and discussed with her the rights and obligations that she has with respect to the agreement.

10. It is my belief that has entered into the annexed agreement of her own volition and without fears, threats, compulsion of influence from or any other person.

SWORN/AFFIRMED BEFORE ME at the)
City of in the Province of Ontario)
this day of 200__)

____

____
A Commissioner, etc.

LIST OF ABBREVIATIONS

CABs	Ismaili Conciliation and Arbitration Boards
CCMW	Canadian Council of Muslims
Charter	Canadian Charter of Rights and Freedoms
CLRA	Children's Law Reform Act
Dal. L.J.	Dalhousie Law Journal
FACT	Fathers Are Capable Too
FLA	Family Law Act
G.A. Res	General Assembly Resolution
Ismailis	The Shia Imami Ismaili Muslims
L.J.	Law Journal
LEAF	Legal Education and Action Fund
O.J.	Ontario Judgments
Queens L.J.	Queens Law Journal
R.F.L	Reports of Family Law
R.S.O.	Revised Statutes Ontario
S.C.R.	Supreme Court Reports
Sup. Ct.	Superior Court
UNTS	United Nations Treaty Series
WLUML	Women Living Under Muslim Laws

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